THE CONSTITUTIONAL SYSTEM OF BRAZIL

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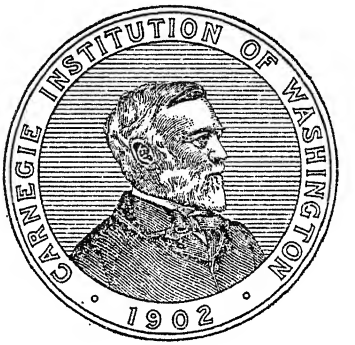

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PREFACE.

To attempt a description of the constitutional and governmental system of one's own country is a task which taxes all the powers of examination, observation, and judgment of even the most thorough and capable student of government. To undertake the same study of a foreign government is infinitely more difficult. No mere study of constitutions, laws, and court decisions, no matter how painstaking and thorough such a study may be, will suffice to acquire an accurate and complete view of the governmental system.

For an adequate picture one must live oneself into the traditions, ideals, and even prejudices of the people whose government is to be studied. The intangible factors that play such an important part in the actual operation of a governmental system can never be properly evaluated from mere reading. Only after gathering the conflicting points of view of many individuals and following the discussions in the public press, at all manner of gatherings, and even in the streets and public places, can one begin to arrive at a just and fair estimate of the subtle and ofttimes conflicting forces that influence the actual operation of a system of government.

For such a study a year is all too short a time. It is with full realization of the fact that two or three times that length of time would still fall short of an adequate period for a complete familiarity with the institutions of Brazil, that the author presents his report on the year he spent in studying the constitutional system of that country. If there is any compensating feature for the handicaps under which any foreigner undertakes such an investigation it is in the fact that he starts with no prejudices of his own. In examining the government of a foreign country, his very lack of a life-long acquaintance with its problems and conflicting points of view enables him to treat of those problems with an impartiality that even the most gifted of national commentators can with difficulty attain.

This study, such as it is, could never have been completed without the whole-hearted support and interest of a large number of persons, both Americans and Brazilians. To enumerate all the sources from which the writer obtained invaluable aid would be impossible. But to omit mention of some of them would be an act of gross discourtesy and ingratitude.

To Dr. Leo S. Rowe, Director General of the Pan American Union, the writer is indebted not only for encouragement in undertaking this study as a research associate of the Carnegie Institution of Washington, but also for helpful suggestions, references, and letters of introduction to prominent men in Brazil.

To our Ambassador to Brazil, Hon. Edwin V. Morgan, the writer owes a debt of gratitude for his unfailing courtesy and helpfulness in making other important personal contacts.

To our commercial attaché to Brazil, Dr. William Lytle Schurz, were due not only many similar personal contacts, but also much valuable information flowing from his intimate knowledge of the country and from the free use of the materials in his office. Another American in Rio de Janeiro who furnished the writer with much first-hand information was Dr. Richard P. Momsen, member of the Brazilian bar and a practicing attorney.

To Mr. Irvin Stewart, of the department of government of the University of Texas, I am indebted for the preparation of the index to this volume.

Of the large number of Brazilians who aided the writer in his studies, including members of the Federal Supreme Court, cabinet officials, national senators and deputies, army and navy officers, administrative officers of the national government, state and local officials, authors, professors, and editors, it is possible to mention separately only a very few. Dr. Max Fleiuss, secretary of the Instituto Historico e Geographico, made available the valuable materials contained in the archives of that institution. Dr. Alfredo Ellis, senator from the state of São Paulo, devoted many hours to discussions of political and governmental questions with the writer. Dr. Otto Prazeres, secretary of the presidency of the chamber of deputies, supplied the writer with much material that would otherwise have been very difficult to obtain, and offered many suggestions growing out of his long acquaintance with the workings of the national congress.

But to Dr. Araujo Castro, assistant secretary of the department of agriculture, industry, and commerce, and author of various standard treatises on Brazilian public law, the thanks of the writer are most especially due. His published works proved to be the most helpful introduction to the study of the Brazilian Constitution. He, moreover, furnished the writer much valuable material and opened the way to many important contacts. Above all, however, in the midst of most pressing and exacting duties, Dr. Castro took the time for the burdensome task of reading and commenting on the entire manuscript when it was finally completed. His criticisms eliminated errors and rectified judgments, in addition to supplementing information on various points. In thus gratefully acknowledging the aid received from Dr. Castro, the writer, of course, in no way charges him with responsibility for the errors or mistaken opinions that may be found still to persist in the work.

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HISTORICAL BACKGROUND OF THE BRAZILIAN FEDERATION.

It may be said that there seems to be a general law of evolution of federal states in accordance with which independent states associate themselves first in looser forms of union, such as confederations, which then develop naturally into the higher form of a federal union. Examples of the operation of such an apparent law of evolution are afforded by virtually all of the outstanding federations of the world, the United States, Germany, Switzerland, and others. But to this law Brazil constitutes an exception. There the federal form did not follow upon a more loosely constituted union, but, on the contrary, superseded a highly centralized unitary type of organization.

The change from the unitary form to the federal form of organization in Brazil accompanied the sudden transition from the monarchical to the republican form in 1889; and, in fact, the doctrines of republicanism and federalism were there closely associated in their origin and development. A brief retrospect of the constitutional development of the country will explain this unusual and sudden transmutation of the governmental system.

THE COLONIAL PERIOD.

In the very beginning of Brazilian history the foundations were laid for the division of the country into states, almost as they exist geographically to-day. The Portuguese Crown adopted, as an easy and inexpensive way of colonizing the possessions in Brazil, the plan of feudal captaincies. The seacoast was to be measured off into approximately equal stretches of 150 leagues each, which, together with the *hinterland* for an unknown and therefore indefinite distance, should be put in charge of feudal *donatarios*. These men, members of the formerly powerful feudal nobility of Portugal, were to provide the colonists and govern the captaincies with practically absolute powers. The captaincies were actually delimited in 1534 and assigned to their respective *donatarios*, their littoral extent, and in a number of cases their names, being virtually identical with the corresponding states in the federation to-day.

Had this scheme of colonization succeeded, it is not at all unlikely that Brazil would have split up, as did the Spanish possessions in America, into a number of independent units upon the separation from the mother country. It happened, however, that this plan of colonization had to be abandoned, because in reality only one of the twelve feudal captaincies was permanently settled. The captaincies

remained as originally marked out, some of them not settled for many years. But in 1548 a royal decree created the office of governor-general of the colony, with his seat of government at Bahia, the other captaincies being put under the control of governors responsible to the governor-general. Another royal captaincy was later established at Rio de Janeiro, to which the seat of the colonial government was ultimately transferred, but the system was one of extreme centralization.

The colonial period of Brazil seems to have been marked by the development of a national consciousness such as did not fully mature in the English colonies of North America until the period of the Revolutionary War. Men were conscious of being Brazilians rather than merely Bahians or Pernambucians, though there were not lacking even in the colonial period evidences of protest against the complete subordination of the provinces to the capital. The disturbances of the seventeenth and eighteenth centuries, the so-called revolutions in Bahia, Maranhão, and Pernambuco, were not, however, attempts to break away from the control of the central colonial administration.

Of more significance was the revolution in Minas Geraes of 1789. It was primarily, of course, a movement for independence from Portugal and the establishment of a republic. But the example of the United States was prepotent among the small group of intellectuals who entered into the ill-fated conspiracy, and the labors of the constitutional convention of Philadelphia were known to them, so that the federal plan adopted by us might have had great influence if the conspiracy had resulted in a successful revolution.

The beginning of the nineteenth century, however, found Brazil in the position of an exploited colony, composed of subordinate administrative districts with three centuries of history as geographical entities but without any measure of local autonomy. The theoretically complete control exercised by the vice-regal government at Rio was, it is true, much impaired by the enormous distances and the difficulties of travel. But this inured not to the benefit of the provinces, but to that of the governors who exercised despotic powers from which there was no appeal.

THE PERIOD OF THE EMPIRE.

The advent of the Portuguese Court to Brazil in 1808 did not carry with it any immediate alteration in the status of the captaincies or provinces. Dom João effected a number of measures which were of the greatest significance for the country as a whole, but the administrative system of extreme centralization was even more pronounced than during the period of the vice-royalty, only now the provinces were the tributaries of Rio de Janeiro instead of Lisbon. The

enthusiasm with which the monarchy was welcomed and the expectations that were aroused by the liberal measures instituted by the Portuguese crown, tended to stifle the normal growth of republican and separatist tendencies in Brazil during the period in which the struggle for independence was being waged in the Spanish colonies.

But neither the raising of Brazil in 1815 to a status of equality with Portugal as co-member of the United Kingdom nor the military successes of the monarch in the north and in the south of Brazil, could altogether extinguish the smoldering discontent with the abuses of the governmental system. The taxes were as burdensome as before, the economic condition of the provinces was as desperate, the lack of popular participation and local autonomy was as complete as in the days of the vice-royalty, and in addition the avaricious and licentious entourage of the court accentuated the antipathies between Portuguese and Brazilians.

These factors, combined with the weak and inefficient character of the governor of the province of Pernambuco, led to a revolutionary outbreak in 1817 which threatened to spread to other provinces. But the uprising was a move of desperation in protest against intolerable conditions and lacked a clearly formulated program. It developed into a frankly republican and separatist movement before it was crushed, but it can hardly be said to have exercised a lasting influence upon the development of republican or liberal ideas in Brazil.

Of prime importance in the constitutional development of Brazil was the period following the revolutionary movement in 1820 in Portugal, which led to the adoption of a liberal constitution and the recall of the king from Brazil. The liberal movement in Portugal awakened echoes in Brazil, and new hopes were born for the accomplishment of necessary reforms in the government. The action of the Cortes of Portugal, however, led to the declaration of independence of Brazil in 1822, and thereafter the constitutional evolution of the country was freed from the distracting influence of a distant government.

Again the hopes for an enlightened and liberal scheme of government were doomed to extinguishment—hopes founded on the apparent devotion of the young Prince Pedro, now constitutional emperor of an independent Brazil, to liberal ideals. Pedro, indeed, redeemed his promise to call a constitutional convention, but the movement ended in disaster, for the convention was forcibly dissolved, and the Andradas, who had been largely responsible for the action of the Prince in declaring Brazil independent, and who had served as his ministers since that time, were banished to France.

This *coup*, which occurred in November, 1823, aroused the most profound manifestations of ill-will and opposition throughout the

length and breadth of the land. Particularly pronounced was the indignation in Pernambuco, in which the memory of the cruel reprisals practiced by the government upon the revolutionists of 1817 was still vivid. A revolutionary government was instituted, and the new constitution of the empire, drawn up by the council of state and sworn to by the emperor on March 25, was rejected. The revolution, like that of 1817, was soon put down by the government, but it had a lasting significance because it signalized the birth of the federal ideal in Brazil, which thereafter came to be intimately entwined with the republican ideal. The revolutionary movement of 1824 having spread from Pernambuco to three other provinces immediately adjoining it in the north, there was launched the project of the "Confederation of the Equator," based on the constitution of the then Republic of Colombia. But the movement never progressed beyond the provisional government stage, for the imperial government after the promulgation of the constitution of the Empire suppressed it by energetic military measures.

This constitution of 1824 was the instrument under which Brazil was governed during the remaining sixty-five years of the period of the empire. In many respects it represented a liberal triumph over the absolutism of the preceding period. From the point of view of the powers of local self-government in the provinces and municipalities, however, the constitution showed little advance over the earlier system of complete centralization.[1]

As regards the position of the provinces in the governmental system of the Empire, the constitution of 1824 was fairly explicit. It continued the division into provinces as then existing, but provided for their future subdivision by law.[2] They constituted election districts for the choice of both deputies and senators, the former chosen for four years, the latter for life, both by indirect elections. The senators, moreover, were actually selected by the emperor from a triple list submitted by the provinces. The manipulation of the electoral process by the government during the empire, however, effectually destroyed the character of the members of the congress as representatives of the majority of even the limited electorate then admitted to the vote.

If the provinces as such had little voice in the conduct of the government of the empire, they were almost equally inarticulate when it came to the management of their own internal affairs. The constitution, indeed, expressly recognized the right of all citizens to

[1] An annotated edition of the constitution of 1824 is available in a volume by José Carlos Rodrigues, *Constituição do Imperio do Brasil* (Laemmert, Rio de Janeiro, 1863).

[2] The Cisplatine province was lost to the empire by the treaty of 1828 and became the independent state of Uruguay. The province of Amazonas was created out of a district of Pará in 1850, and the province of Paraná was created out of a district of São Paulo in 1853, thus establishing the twenty states as to-day existing.

participate in the affairs of their own provinces of immediate concern to themselves. To this end, it provided for the establishment of municipal or district councils and general councils of the provinces.

The latter were to consist of twenty-one councilors in the larger provinces and thirteen in the less populous ones, chosen by indirect election for the term of four years, and meeting in the capitals of the provinces.[1] But the functions of these bodies were restricted to "proposing, discussing, and deliberating on measures of interest to their provinces." Even this power of debate was expressly denied as regards matters of general interest to the nation—agreements with other provinces, taxes, and the execution of laws. In other words, these bodies had no legislative powers, no financial powers, and no administrative powers, their resolutions regarding matters of local interest being submitted to the national parliament for enacting into law by the ordinary process of legislation.

The municipalities were in no better position, for although the constitution accorded them the power of managing their own economic and local affairs by means of elective councils, the extent of this power was left to be determined by law, and the law failed to endow them with vital powers of local self-government. Furthermore, all decisions of the municipal councils had to be submitted first to the provincial councils and then to the central authorities.

The real government of each province was centered in the hands of a president, appointed and removed by the emperor. So far as the minutiæ of local administration were not elaborated in national laws, it was this official who directed the affairs of the provinces as a whole and of the municipalities within them. His position, moreover, made him the effective agent of the central government in controlling the electoral process, so that there was in reality no real popular choice exercised in the election either of the local councilors or of the representatives in the national congress.

Under the constitution of 1824, therefore, the provinces were in reality mere administrative subdivisions of the empire, without either political or economic autonomy of their own. The central government in the exercise of its power to determine all forms of taxation and to fix the amount of expenditures in the provinces as well as in the national government stifled the economic development of the former in the interests of the latter, while the "moderative power" of the Emperor and the administrative centralization in the hands of the Council of State of life members appointed by him destroyed all possibility of the development of a local political vitality.

[1] The province of Rio de Janeiro was excepted from this provision because of the location of the court in its capital. By the *Acto Addicional* or amendment of 1834, the province of Rio de Janeiro was accorded its own provincial council without jurisdiction over the municipality of Rio de Janeiro, which was designated as the *Municipio Neutro*.

There were a number of factors that led to the disastrous termination, by abdication on April 7, 1831, of the reign of Dom Pedro I, so auspiciously begun in 1822. His fundamentally autocratic nature, his predilection for the Portuguese as against the native Brazilians, his *camarilha* or "kitchen cabinet," composed of sycophant courtiers and headed by a courtezan, his extravagant and corrupt court, and finally the loss of the Banda Oriental, transformed the idol of the new-born nation in 1822 into a ruler almost universally feared and disliked less than a decade later. But joined to all these factors was the growing discontent of the provinces with the economic ruin and political stagnation that was their lot, as a result of the policies of the central government. Towards the end of the reign of Dom Pedro this dissatisfaction voiced itself in open proposals of secession from the empire, a movement destined to become even more serious during the period of the regency that followed upon the emperor's abdication.

The events of 1831 constituted a triumph of the liberal elements of the country, but these elements were divided into two bitterly hostile and irreconcilable factions, the *Moderados,* who favored a liberal constitutional unitary monarchy, and the *Exaltados* or radicals, who were in favor of the twin principles of republicanism and federalism. Opposed to both of them were the Reactionaries, who were committed to the old *régime* and wished the recall of Dom Pedro as regent. A provisional regency of three men was chosen by the members of the Chamber of Deputies present in Rio at the time of the abdication, and in June there was elected the permanent triumvirate to act in the name of the five-year-old Prince Pedro, in whose favor Dom Pedro I had abdicated.

The first regency represented the point of view of the Moderate Liberals and did not satisfy the aspirations of the supporters of republicanism and federalism. Throughout the country the most serious disorders broke out, intensified by the insubordination and lawlessness of the army. The central government found itself unable to cope successfully with these disturbances, and for a time it looked as though Brazil would break up into its component provinces, as had just happened with the Republic of Greater Colombia in the north.

In 1834 matters took a little better turn by the substitution of a single regent in place of the triumvirate, and the selection of Father Diogo Antonio Feijó for that post. This amendment of the constitution as well as the abolition of the council of state was embodied in the so-called *Acto Addicional,* which also accorded to the provinces a measure of real autonomy. By this enactment provincial legislatures were substituted for the provincial councils and the jurisdiction of the provinces in financial and administrative matters considerably enlarged. Instead of a mere power of discussion and proposal, the provincial assemblies were accorded the right of legislation on a

number of important matters. These included among others the division of the province into civil, judicial, and ecclesiastical districts; the provision of public instruction; the regulation of the exercise of eminent domain; the control over questions of municipal police and administration proposed by the municipal councils; the raising and spending of public moneys for municipal and provincial expenditures, *provided they did not interfere with the general revenues of the central government;* the organization of the public offices and employments in the municipalities and provinces; public works, highways, and navigation within the provinces; the construction of jails, workhouses, and houses of correction; the regulation of the police forces; the contraction of debts and the administration of the public property of the provinces; and the exercise of other powers concurrently with the central government.

This marked a long step in the direction of remedying the evils of over-centralization and suffocation of the provinces, which was one of the causes of discontent among the liberal elements during the *régime* of Dom Pedro I. It is true that some of the laws of the provincial legislatures required the approval of the presidents, themselves still the appointees of the central government and responsible only to it, but these could be re-passed over the veto of the president, and the most important subjects of provincial legislation did not require the sanction of the executive.

The regency of Feijó, while it accomplished much, was unequal to the solution of all the difficulties that confronted it, and lasted scarcely two years. Most of the disorders in the north of the country were at least partially gotten under control, but the most serious sedition in the south, that of Rio Grande do Sul, which broke out in 1835, successfully resisted all efforts of the government, and took on a frankly republican and separatist aspect. Within the parliament the Reactionaries and a portion of the Moderate Liberals united into a conservative opposition which embarrassed the regent at every move. Feijó, therefore, resigned his post, to which he had been elected for a period of four years, in favor of Senator Pedro de Araujo Lima. The victory of the Conservatives, however, did not improve the conditions of the country at large, which was still distracted by lawlessness and by the secessionist movement in Rio Grande do Sul. It did, however, largely destroy the newly won autonomy of the provinces, by the passage of laws which arrogated to the central government practically all possible sources of revenue, and so left the provinces pauperized. They could exercise their powers only by means either of imposing illegal taxes or by becoming mendicants before the central government for the liquidation of their deficits.

This financial impotence of the provinces resulted in their becoming gradually as politically subordinate to the central government as

before, for the support and financial assistance of the imperial government were conditioned upon the political subservience of the provincial authorities. The importance of the provincial assemblies declined and with it the caliber of the men who served therein, until these assemblies comprised virtually only men of mediocre attainments and those who did not possess the public confidence. From this point of view the position of the provinces went steadily from bad to worse during the long reign of Pedro II, which began with the declaration of his majority in 1840.

Of the political developments during the reign of Dom Pedro II, it is not necessary to speak here in detail; for while they were all of the greatest interest and importance in the growth of the movement which finally culminated in the overthrow of the empire and the establishment of the republic, they are only of indirect significance as regards the aspect we are most concerned with, namely, the transition from the unitary to the federal type of government. It is sufficient to emphasize again that the movement for a republic, which began to assume an active and widespread form in the shape of the organization of republican clubs and the publication of periodicals devoted to that propaganda from 1870 on, carried with it almost always the complementary idea of the adoption of the federal principle. When, therefore, on November 15, 1889, circumstances finally favored or rather forced the overthrow of the empire and the proclamation of the republic, one of the first proclamations of the provisional government announced the reorganization of the empire on the federal principle.

THE PROVISIONAL GOVERNMENT AND THE ADOPTION OF THE CONSTITUTION.

The first act of the revolutionary government, at the head of which stood Marshal Deodoro da Fonseca, decreed, on November 15, 1889, the very day of the Revolution, that the form of government to succeed the empire was that of a federal republic, the provinces united by the ties of federation to constitute the United States of Brazil, each of them in the exercise of its proper sovereignty. The nation was to be governed, according to this same decree, by a provisional government until the election of a constituent congress.[1]

The individual states were endowed by decree of the provisional government with the largest measure of local autonomy, including even the control of such administrative matters as the army, the postal service, the customs, etc., which were properly concerns of the central government, even under the most pronounced federalism. But the right accorded to the states to elect their own agencies of government was annulled by decree of November 20,[2] which dissolved

[1] Decree No. 1 of the provisional government. [2] Decree No. 7 of the provisional government.

the provincial assemblies and centered in the hands of the governors, the delegates of the central government, all legislative and executive powers, until such time as the state governments should have framed and adopted their constitutions and established legal governments thereunder. During the whole period of the provisional government, which lasted until February 25, 1891, and even for months thereafter, the direction of affairs in the states was actually in the hands of the central authorities, and of the "sovereign rights" promised in the earliest decrees there was little to be seen.

For the first few weeks of its existence, the provisional government was fully occupied in consolidating the work of the Revolution, though serious armed resistance was nowhere encountered, as the transition in almost all the states occurred without serious difficulties. On November 19 the provisional government established the principle of adult male suffrage for all citizens in the possession of their civil and political rights who could read and write.[1]

As early as December 3, the provisional government appointed a commission of five to prepare a draft of a new constitution to be submitted to the constituent congress when it should meet.[2] On December 21 a decree set as the date for the election of the members of the constituent assembly the following 15th of September, the representatives to be elected by general ticket in each of the states.[3]

The commission of five meanwhile was working on its draft of the new constitution, adopting as the basis of its deliberations three separate proposals prepared by the individual members of the commission. Late in May, 1890, it submitted its draft to the government with unanimous approval. This report may be regarded as the corner-stone of the later instrument; for while Marshal Deodoro was not willing to accept it as it stood, it was used as the basis upon which the ministry, under the leadership of Ruy Barbosa, drew up the draft which was decreed by the provisional government, on June 22, 1890,[4] as the project to be submitted to the constituent assembly, the date of whose convocation was fixed for the 15th of the following November.

It is not possible, within the limits of this study, to examine in detail the sources upon which the individual members of the commission of five relied for the models followed by them in the drafting of the individual proposals or of the final report. Such sources were numerous. They included, besides the imperial constitution of 1824, with subsequent amendments, various proposals that had been made in the course of the federalist and republican propaganda which had

[1] Decree No. 6 of the provisional government.
[2] Decree No. 29 of the provisional government.
[3] Decree No. 78B of the provisional government.
[4] Decree No. 510 of the provisional government.

begun to manifest itself in the empire, beginning as early as 1830. Directly or indirectly, however, the example of the United States of America was the most potent influence; for not only were these proposals themselves largely modeled on the Constitution of the United States, but in addition such other existing federal constitutions as they had knowledge of in this hemisphere or in Europe had themselves been largely influenced originally by the same example.

When the ministry of the provisional government undertook the revision of this draft, the leading spirit in this work, Ruy Barbosa, was a profound student of our constitutional system. So far as the revised draft, decreed by the government on June 22, differs from the report of the commission of five, this difference is in the direction of a closer approximation to the Constitution of the United States of America.[1]

This government project of the constitution was somewhat modified by decree of October 23, 1890, which determined the form in which the draft was submitted to the constituent congress when it met on November 15, 1890, just one year after the declaration of the republic. This congress was elected in accordance with the provisions of the government draft and consisted, therefore, of two chambers instead of one, as had been provided in the original decree of December 21, 1889, calling for elections to a single-chambered congress. Each of the twenty states and the federal district was represented by three senators and by a number of deputies varying according to the population of the states, but amounting to 205 in all, making a total membership of 268. Of these, 131 belonged to the "historic republican party," and by virtue of its control over the election process the provisional government was able to control the composition of the entire body.

On November 22 the congress, sitting as a body, selected a committee of 21, one from each of the federal units represented, to examine and report on the draft constitution submitted by the provisional government. This committee made its report on December 10 and from then on the work of the congress consisted in the consideration of and action upon the report of the committee. The committee report offered a number of amendments to the government project, some of which in turn were altered upon motion of individual members of the congress. To compare in detail the texts of the government project and of the report of the committee of 21 with the final text of the constitution as promulgated on February 24, 1891, while perhaps full of interest to the student of constitutional

[1] The texts of these two drafts are printed side by side and compared by Felisbello Freire in his *Historia Constitucional da Republica*, Vol. II, Ch. XIII, with a view to emphasizing the importance of the work of the commission of five and of negativing the claim of Ruy Barbosa to being the author of the constitution of Brazil.

history, would scarcely be justified in a study such as this.[1] Some further mention of the matter will be made in studying the more important features of the Brazilian constitution in later chapters. Suffice it here to say that to all intents and purposes the net work of the constituent congress was to approve in all its more important features the draft constitution submitted by the provisional government, which, as has been seen, was largely the work of Ruy Barbosa in modification of the original draft prepared by the commission of five appointed on December 3, 1889. Thus we have the historical background of the present constitution of Brazil.

While this development was proceeding in the domain of the national government, the states were continuing under the direction of governors appointed by and responsible solely to the provisional revolutionary government. Assured, by the first decrees of the provisional government, of the enjoyment of their proper sovereignty, particularly the right of framing their own constitutions and of electing their own officers, the states nevertheless remained under the complete control of centrally appointed agents who exercised all governmental powers under the direction of the provisional government. Not until October 4, 1890, almost a year after the Revolution, did the provisional government, having already promulgated a provisional federal constitution which included detailed provisions regarding the form of government and jurisdiction of the states, make provision for the calling of constituent assemblies in the states.[2] By this decree the governors of the states were instructed to call elections for legislative assemblies in the states, to function as constituent assemblies in the first place, and to set their opening date for April, 1891. Meanwhile, the governors themselves were to promulgate constitutions which should be submitted for approval to the constituent assemblies, but which in the meantime should go into effect and control the organization of the first legislative assemblies.

In accordance with this law, constitutions began to be decreed by the governors of the states during the period in which the national constituent assembly was still debating the terms of the federal constitution, which itself contained proposed provisions profoundly affecting the form of organization and the extent of powers of the states. As early as the same month in which this decree was issued, October 1890, the governor of Goyaz decreed a constitution for that state and from then on through the following April the other state governors followed suit. The promulgation of the constitutions as approved by the constituent assemblies of the states occurred during the months of May, June, July, and August of 1891. But the revolu-

[1] Such a comparison has been made, article for article, by João Barbalho, in his monumental work, *Constituição Federal Brazileira.*

[2] Decree No. 802 of the provisional government.

tion of November 23 of that year, which resulted in the retirement of Marshal Deodoro from the presidency to which he had been elected by the national congress, interrupted the newly established constitutional *régime* in the states, and was followed by the annulment of these constitutions and the adoption of new ones in a majority of the states in the following year.

It followed, therefore, from the peculiar circumstances of the origin of the Brazilian federation, as compared with that of the United States of America, that not only was the federal government not the work of the individual states, but that these latter enjoyed no constitutional status of any kind until after the definite organization and actual functioning of the federal government created by the constitution.

Of the events following upon the inauguration of the new government—the *coup d'état* of November 3, by which the president dissolved the congress and ruled as dictator, the retirement of Deodoro in consequence of the revolution of November 23, the naval revolt of 1893, and the rebellion in Rio Grande do Sul—it is not possible here to speak. They were all events of an extra-constitutional or revolutionary character and while not without the profoundest effect upon the political development of the country, they hardly belong in a brief survey of the historical background of the Brazilian constitution. So far as they are intimately related to certain aspects of the existing constitutional system they will be touched upon in another place.

CHAPTER II.

FEDERAL BASIS OF THE BRAZILIAN SYSTEM.

In the preceding chapter it has been shown how different was the origin of the federal system in Brazil from that of the United States of America. In this chapter the principal features of the Brazilian federal system established by the constitution of 1891 will be presented in comparison with our own.

The division of governmental powers between the national government and the component states constitutes, of course, the essence of the federal system for all practical purposes, though political scientists have at times emphasized other features. Some have been inclined to attach great importance to the origin of these powers, whether original or derived. Others have picked on the amending process as the true criterion of the federal system. But at any given time it is clear that the actual division of powers between the two elements is the important factor in determining the character of the federal system.

In the constitution of Brazil, as in the Constitution of the United States of America, this division of powers between states and nation is not determined in any one section or article, but is indicated in a number of different provisions, scattered more or less throughout the whole document. Some of these provisions confer powers on the federal government; others confer or confirm powers of the states; still others deny powers to the federal government, and a fourth category forbids the exercise of other powers by the states. An exhaustive examination of this fundamental question of distribution of powers between central and local governments would touch, therefore, the majority of the most important provisions of the fundamental law. For the sake of convenience in treatment, we may group the federal features of the Brazilian constitution under the following main heads: (1) General theory of distribution; (2) powers granted to the federal government; (3) powers granted to the state govenments; (4) powers denied to the federal government; (5) powers denied to the state governments; (6) participation of the states in the organization of the federal government; (7) rôle of the states in the amending process.

GENERAL THEORY OF DISTRIBUTION OF POWERS IN BRAZIL.

In the United States of America the whole process of the formation of the Union established the constitutional principle that the federal government was a government of delegated powers and that all powers not taken from the states and given to the Union remained

with the former. This principle was given express sanction for greater certainty in the tenth amendment.[1] In Brazil, however, the process of the formation of the federal system would have led to the opposite conclusion, in the absence of any declaration to the contrary. It is, therefore, no mere verbiage but a fundamental part of the Brazilian constitution which says: "The states enjoy in general every and any power or right not denied them by express provision of the constitution or by implication from such express provisions."[2]

It is to be noted that the wording of the Brazilian constitution differs from the corresponding provision in our own document in that it accords recognition to the doctrine of implied restrictions on the states. As this is simply another way of asserting the doctrine of implied powers of the federal government, the Brazilian constitution embodied the principle which in the United States was developed, not without difficulty and criticism, by judicial interpretation. But, whereas in the adoption of the tenth amendment to our own constitution, the Congress contented itself with rejecting a proposal to insert the word "expressly" in the amendment, in Brazil the provisional government went one step further by changing the text prepared by the commission of five to include the reference to implied limitations on the powers of the states. This statement of the fundamental principle of the division of powers between states and nation was accepted by the constituent congress with only a minor alteration in language. But there, also, a proposal was made and rejected to insert a provision declaring that the Union should possess only those powers *expressly* conferred upon it.[3] This was but one manifestation of the tendencies toward extreme decentralization, amounting almost to confederation, which made themselves strongly felt in the constituent congress.

This fundamental provision of the Brazilian constitution may truly be called, in the words of the greatest commentator on that document, "the master key of the federation," "the golden rule of the division of jurisdiction."[4] But its practical significance depends obviously on the extent to which powers and rights are conferred in the constitution expressly or by implication on the union or denied in the same way to the states.

One other express provision of the Brazilian constitution dealing with the general theory of the government instituted thereby and also taking a leaf from the experience of the United States of America is worthy of notice. This is contained in article 1, which, after

[1] "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[2] Constitution of the United States of Brazil, art. 65, sec. 2.

[3] *Annaes do Congresso Constituinte*, Vol. I, p. 327. (Cited in Barbalho, João, *Commentarios* p. 273.)

[4] Barbalho, *op. cit.*, p. 273.

describing the form of government adopted as that of a federated republic, expressly designates it as a "perpetual and indestructible union of the former provinces." It is true, of course, that such a declaration in the articles of confederation of the North American Colonies did not prevent the dissolution of the system which they established; but on the other hand, the failure of the constitution of the United States to make any express declaration on the power of secession gave color to the assertions of the states' rights advocates that the constitution was a contract that could be abrogated by one party, the states, when violated by the other, the federal government. This Brazilian assertion of perpetuity and indestructibility was not contained in the draft of the commission of five, but was inserted in the decree promulgated by the provisional government on June 22, 1890. Objections were raised to these expressions in the constituent congress and amendments were introduced to eliminate them, but the prevailing opinion was in favor of their retention.[1]

POWERS GRANTED TO THE FEDERAL GOVERNMENT.

Since the federal government of Brazil, like that of the United States of America, is a government of enumerated powers, it is necessary to find in the constitution authority for every power exercised or sought to be exercised by a provision granting that power either expressly or by implication. An examination of the express powers granted by the constitution is relatively simple. A complete enumeration of the powers implied is manifestly impossible, since these are defined from time to time only as a new exercise of power on the basis of implication is attempted by the federal authorities. Some of the more important of these implied powers so far recognized in practice or in judicial decisions will be considered in the appropriate place.

FEDERAL INTERVENTION.

One of the most significant of the powers granted to the federal government in Brazil is treated near the very beginning of the constitution, but being couched in negative terms it looks at first view more like a prohibition than a grant. Its importance is quite likely to be overlooked, therefore, in any mere examination of the text of the Brazilian constitution, especially as it appears at first sight to be a simple paraphrase of a provision of our constitution which has not played any very prominent part in our own constitutional development. This important provision is contained in Article 6 and merits quotation in full.

[1] Barbalho, *op. cit.*, p. 10.

The federal government may not intervene in the affairs pertinent to the states, except:

1. To repel foreign invasion, or invasion of one state by another;
2. To maintain the federal republican form;
3. To reëstablish order and tranquillity in the states upon request of their respective governments;
4. To insure the execution of federal laws and judgments.

The power of intervention by the central government in the affairs of the states was asserted and established in positive form, in decree No. 1 of the provisional government, on November 15, 1889, the day on which the unitary empire was overthrown and the federal republic decreed. According to the terms of this declaration the provisional government undertook to intervene, with the use of force if necessary, to assure the free exercise of the rights of the citizens and the free action of the constituted authorities in any state in which public order might be disturbed and where the local government lacked the requisite means for suppressing the disorder and insuring public peace and tranquillity.[1] The succeeding article of this decree declared that the federal republican form of government having been declared for Brazil, the provisional government did not and would not recognize any local government in conflict with the republican form.

In the draft constitution prepared by the commission of five appointed by the provisional government there were incorporated in article 6 the provisions relating to federal intervention practically in the form in which they are now found in the constitution. Only minor changes in wording were introduced in the constitutional draft decreed by the provisional government and in the form in which the constituent convention finally adopted the article.

The models for the provisions in question in the Constitution of the United States are apparent enough.

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence.[2]

The Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."[3]

The variations in the text between the provisions of our own constitution on this point and those of the constitution of Brazil are obviously not of great significance; and yet the rôle played by this power of federal intervention, couched though it is in the constitution of Brazil in negative terms, has been incomparably more important in that country than with us. An examination of some of the more striking instances in which this power has been invoked in the constitutional history of Brazil belongs in another place. Suffice it

[1] Decree No. 1, of Nov. 15, 1889, art. 6.
[2] Constitution of the United States, art. 4, sec. 4.
[3] *Ibid.*, art 1, sec. 8, par. 15.

here to make brief mention of some of the commentaries upon this article by the classic exponent of the Brazilian constitution.[1]

First of all it is to be noted that the term "governo" employed in this article in regard to the power of intervention means government in the broad sense, not in the narrow sense of the administration or executive branch of the government, in which it is so often employed. In other words, this important power is not entrusted to the executive alone, but involves the collaboration of all the branches of the government. Nevertheless, as a practical matter it is the executive branch of the federal government which takes the initiative and occupies the dominant position in this regard. This flows from the position of the president, as commander-in-chief of the armed forces, as charged with the duty of maintaining the internal and external security of the republic, and as authorized to declare a state of siege in the recess of the congress.

The power to intervene for the purpose of repelling foreign invasion or invasion of one state by another is not restricted to the cases of actual accomplished invasion, but applies also to the case of threatened invasion, which the executive may and must prevent as well. This power is in its nature one seldom invoked and little likely to be abused. It scarcely presents an opportunity for federal infringement upon States' rights.

Of quite a different character, however, is the power to intervene in order to maintain the federal republican form. It is not clear what significance, if any, was to be attached to the use of the word "federal" in this connection. The draft of the commission of five contained simply the words "to guarantee the republican form." The provisional government altered this to read "to maintain the republican federal form," and this reading was retained by the constituent congress. It was evidently intended, however, to reproduce the corresponding provision of the United States constitution.

The question of what is a "republican form" is not defined in the Brazilian constitution any more than in our own, but Barbalho cites with approval Madison's definition in the "Federalist," and a definition in Walker, "American Law," to the effect that this provision prohibits governments that are "despotic, aristocratic, monarchical, or, in one word, *anti-republican.*" He is very explicit, moreover, in his declaration that this basis of federal intervention is not restricted to the cases in which the outward forms of a republican government may have been threatened or destroyed. It may properly be invoked also when the outward forms or machinery of a republican government are retained, but the regular functioning thereof, its effective application, or the reality of the guaranties established thereby are involved.

[1] Barbalho, João, *Constituição Federal Brazileira*, pp. 20–27.

The lack or cessation of the government in a state, a duality of governors or legislative bodies constitute a veritable suspension, violation, or deprivation of the republican form. In like manner, political conflicts between the various authorities of a state when they embarrass or destroy the constitutional action of any one of them. These are, therefore, cases for federal intervention covered by article 6, section 2.[1]

Here we have a power which is obviously capable of the broadest interpretation. Although but rarely invoked and never accurately defined in the United States, this power of the federal government to intervene in the states for the maintenance of a republican form of government has played a rather important part in the constitutional history of Brazil since the establishment of the Republic. In this respect Brazil has followed rather the constitutional practice of the Argentine[2] than that of the United States.

In contrast with the power of intervening for the purpose of repelling invasion, reëstablishing order and tranquillity in the states upon request of their respective governments, or insuring the execution of federal laws and judgments, which by its very nature rests with the executive branch of the government, at least so far as the initiative is concerned, the power to intervene in order to maintain a republican form of government involves the determination of a political question which by its very nature appertains properly to the legislative branch of the government. In the words of a report of the committee on the constitution of the senate of Brazil (May 24, 1893): "If this power were accorded to the executive, the federation of the states and the Brazilian Union would be undermined at their base, tottering on their foundations, crumbling under the first blow delivered against them by this authority. Under such conditions we should have not the president of a republic but a veritable dictator."[3]

In like manner the question of the existence or non-existence of a republican form of government within the meaning of this provision of the constitution is not for the determination of the judicial branch of the government, by reason of its being essentially a political question; but obviously both the executive and the judicial branches of the federal government will inevitably be drawn into action, once the legislature has declared a case for intervention to exist, the former to carry out the necessary executive measures, the latter to decide cases and to punish crimes arising out of such intervention.

As a practical matter, however, owing to the prominent position occupied by the executive in the political organization of Brazil, even this basis of federal intervention rests very largely with the determination of the administration.

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[1] Barbalho, *op. cit.*, p. 24.

[2] For a detailed examination of the practice of federal intervention in the Argentine, see Rowe, L. S., *The Federal System of the Argentine Republic.*

[3] Quoted in Barbalho, *op. cit.*, p. 24.

The right to intervene under the third section of article 6, namely. to reëstablish order and tranquillity in the states upon application of their respective governments, differs in its form in the Brazilian constitution from that in our own constitution only in that it does not specify that this application must come in the first instance from the legislature, and only in case of its being impossible to convene the legislature must the application come from the governor. But the use of the term "government" here again in the Brazilian constitution is not, according to Barbalho, to be interpreted in its narrower though common sense of "administration" or "executive," though the draft of the provisional government spoke of "local authorities" and the constituent congress substituted the words "respective governments."

The limitation on this right to intervene, introduced by the requirement that it shall be upon application of the state governments, applies only so long as there is a duly constituted government. When internal order and tranquillity have been destroyed to such an extent that no duly constituted authority remains, the case is presented in which the federal government can intervene without such application in order to maintain the republican form of government.

The power to intervene in the internal concerns of the states to insure the execution of federal laws and judgments need scarcely have been included in this article, as it flows necessarily from other provisions of the constitution.[1] It resides by its very nature in the hands of the president by virtue of his obligation to see that the laws are faithfully executed.[2] The judiciary and the legislature must of course coöperate to the extent of aiding the executive as far as may be necessary, but the primary responsibility is on him.

One interesting question may arise when federal intervention in the internal affairs of a state becomes a matter of more or less frequent occurrence. By whom shall the expense of federal intervention be defrayed, by the state or by the nation? To this Barbalho replies by the opinion that while the cost of defending a state against external invasion or aggression is undoubtedly a proper charge upon the federal treasury, the cost of reëstablishing order or of extraordinary measures required for the execution of federal laws or judgments in the states should be borne by them.[3]

Such are the main features of this important power of federal intervention in Brazil so far as its constitutional basis is concerned. In theory it is scarcely distinguishable from the American prototype; various factors have contributed to its much more extensive application. The use or abuse of this power of federal intervention constitutes one of the most delicate of the questions touching upon the

[1] Arts. 14 and 48, secs. 3 and 4. [2] Art. 48, sec. 1.
[3] For a contrary opinion, see Araujo Castro, *Manual da Constituição Brasileira*, 2d ed., p. 39.

relations between the federal government and the states in Brazil to-day.

FEDERAL TAXING POWER.

Immediately following this important article treating of the power of federal intervention comes an article which sets forth certain of the exclusive powers of the federal government in matters of finance. As this question of revenues was one of the most important in the eyes of the advocates of provincial autonomy, due to the stifling of the provinces, on the one hand, by the financial impotence imposed upon them by the government of the empire, and, on the other hand, to the evasion of the constitutional provisions by the provinces in the attempt to get around these restrictions, it was natural that it should have been accorded a prominent place in the constitution.

With regard to the sources of revenue assigned exclusively to the federal government, the original draft of the commission of five accorded to the central government the exclusive power to levy import taxes, taxes on the entry and clearance of vessels, stamp taxes, and postal charges. This provision was not changed essentially by the constituent congress, which recognized the necessity of according to the federal government the power of collecting taxes directly through its own agencies, not by means of quotas from the states. Not only did the committee of 21 of the congress refer to the experience of our own government under the articles of confederation in its failure to collect such state quotas, but it also emphasized the need of giving such power to the central government by reference to the unfortunate experiences of the Empire itself with regard to such quotas.[1]

In some respects the taxing power of the Brazilian federation, though consciously modeled on that of our own federal government, is more restricted. Not only are the same limitations imposed there as we find in our constitution, viz., prohibition on export taxes, requirement of uniformity throughout the states, prohibition of preferences to the ports of one state over those of another, etc., but in addition, by article 9 of the Brazilian constitution, certain important sources of revenue are assigned exclusively to the states which in the United States are not denied to the Union. Whereas the federal government with us is limited in regard to direct taxes only by the requirement that they shall be laid in proportion to population of the states, and not even that with regard to income taxes since the adoption of the sixteenth amendment, in Brazil the states are given exclusive power to tax not merely exports, but also real property, transfer of property rights, and industries and professions. In consequence of this provision, and in spite of the grant in article 12 of power to the Union as well as to the states to use any other sources of

[1] Barbalho, *op. cit.*, pp. 28, 29.

revenue not enumerated in articles 7 and 9 nor otherwise forbidden by the constitution, the federal government in Brazil is deprived of the possibility of using important sources of revenue that are open to the Union under our constitution.

As has already been pointed out, it is not uncommon to find in the text of the Brazilian constitution provisions which are not encountered in our own document, but which have been read out of it, or into it if you please, by judicial decisions. An example of this is furnished in this connection by article 10 of the Brazilian constitution, which forbids the federal government as well as the states to tax the property, income, or services of the other.

Viewing the taxing power of the Brazilian federation as regards both the sources expressly reserved to it by the constitution and the sources exclusively assigned to the states, we find that the Union in Brazil was in effect restricted to indirect taxes, viz., stamp taxes, customs, and excises. Objections to this limitation of the taxing power were voiced even in the constituent congress, and since then, on numerous occasions and by various writers, on the ground that it left the Union without sufficient sources of income to meet its necessities. But even at the time of this partition of revenues between the states and the nation, the indirect taxes at the disposal of the federal government were incomparably more lucrative than the direct taxation assigned to the states. This has been increasingly true in the interval since that time, largely due, no doubt, to the fact that the states have in general been very reluctant to employ the property tax, a source of revenue which has preponderated so largely in the states of our own Union.

Closely related to the taxing powers of the federal government and included in the same article with them in the Brazilian constitution is the exclusive jurisdiction of the federal government to establish banks of emission. Here again a leaf was taken out of the constitutional history of the United States, for whereas the Union with us had to resort to the taxing power to drive the issues of state-bank notes out of circulation, in Brazil the constitution itself expressly reserves the exclusive right to establish banks of issue to the federal government.

POWERS OF THE FEDERAL CONGRESS.

The powers of the federal government considered above, as well as certain others not specifically considered, such as the national character of the land and sea forces, the right of the federal government to regulate by law the respective powers of the federal government and of the states over railroads and internal navigation, the power of the federal government to expropriate state telegraphs, the power to lend financial aid to states upon request in case of public

calamity, and others of minor significance, are contained in the Brazilian constitution in the introductory articles of the instrument. Most of the powers of the federal government, however, are enumerated in the Brazilian constitution as in ours in that portion of the instrument which treats of the powers of the national congress.[1]

The enumeration of the powers of the national congress in the constitution of Brazil is introduced with the statement: "The national congress shall have *exclusive*[2] power to * * *." This word "exclusive" is not found in the opening of the corresponding section in our own constitution and was not contained in the original draft of the commission of five. It was, however, included in the draft of the provisional government and was continued by the constituent congress, not without proposals for its elimination, however. It was argued that since the legislative powers of the congress required, by article 16, the participation of the president, it was not proper to speak of these powers as belonging *exclusively* to the congress. But these objections were overruled, properly in the view of Barbalho, because the word relates not to the exclusion of the president but to the exclusion of the states. In other words, this article continues the enumeration of exclusive federal powers, already begun in the preliminary sections heretofore considered, and was calculated to dispel the uncertainty that existed, and in some respects still exists in the United States, as to which of the powers of the federal government are exclusive and which are concurrent with the states. This view of the use of the word "exclusive" in this connection is borne out by the fact that article 35 of the constitution enumerates other powers of the congress which are expressly designated as not exclusive.[3] On the other hand, it is not to be denied that certain of the powers enumerated in article 34 are exclusive not of the action of the states but of the executive branch of the national government. Such are the power to authorize the executive to contract loans and to declare war, the power to ratify treaties, the power to extend or adjourn its own sessions and the power to amend the constitution.

[1] Constitution of the United States of Brazil, Ch. IV. [2] The italics are mine.

[3] A curious obscurity in this regard arises from the fact that among the powers of congress contained in article 35 as not belonging exclusively to that body is included, in the second half of section 1, the power to "take measures regarding necessities of a federal character." This power, in its very nature exclusively federal, could not possibly have been intended to be shared with the states. Nor can this juxtaposition be regarded as altering the meaning of the word "exclusive" as employed in articles 34 and 35. The explanation of the inconsistency is to be found in the fact that in the draft of the provisional government section 1 of article 35 was included in article 34 among the "exclusive" powers. The committee of 21 of the constituent congress reported in favor of transferring the power to "watch over the safety of the constitution and the laws," which constituted the first part of this section, to the non-exclusive enumeration in article 35, the committee having agreed to the elimination of the second portion of the section treating of the measures regarding the necessities of a federal character. In submitting the proposal of the committee of 21 to second reading, the words in question were not omitted and hence were permitted by oversight to remain in the draft as finally adopted. They are, therefore, to be read as being out of place and inconsistent with the other provisions of the two sections in question. See Barbalho, *op. cit.*, pp. 139, 140.

It seems probable, therefore, that the article in question really was intended to indicate the sphere of congressional action over against the executive as well as over against the states, and that is the interpretation adopted by more recent commentators.[1]

So far as the provisions of article 34 serve to indicate the rôle of the congress in the organization of the federal government, they will more properly be considered in an examination of the respective branches of that government. Here we need to be concerned only with the aspect of this article that relates to the definition of exclusive federal powers in derogation of the powers of the states. In this connection it is to be noted that this enumeration of exclusive federal powers is not to be regarded, according to the doctrine of Barbalho, as all-inclusive. Other powers of the federal government which in their very nature preclude concurrent action by the states must also be regarded as exclusive, though not expressly so designated.

Among the more important of the exclusive powers of congress which serve to describe the sphere of federal action may be mentioned the following: To estimate the income and expenses of the national government and examine its accounts (art. 34, sec. 1); to authorize the use of the borrowing power and legislate concerning the public debt (secs. 2 and 3); to regulate international commerce and commerce between the states and between them and the federal district; to erect custom-houses and ware-houses (sec. 5); to regulate the navigation of streams that water more than one state or that extend into foreign territory (sec. 6); to fix the weight, value, inscription, type, and denomination of coins (sec. 7); to create, regulate, and tax banks of emission (sec. 8); to fix standards of weights and measures (sec. 9); to determine finally the boundaries of the states as between themselves, those of the federal district, and those of the nation with the neighboring states (sec. 10); to authorize the government to declare war and to make peace (sec. 11); to ratify treaties and conventions with foreign nations (sec. 12); to change the capital of the Union (sec. 13); to grant subsidies to states upon their request in case of public calamity (sec. 14); to legislate on federal posts and telegraphs (sec. 15); to adopt measures expedient for the safety of the frontiers (sec. 16); to fix annually the land and sea forces (sec. 17); to determine the organization of the army and navy (sec. 18); to permit or forbid the passage of foreign troops through the national territory for military operations (sec. 19); to mobilize and employ the national guard or state militia in the cases established in the constitution (sec. 20); to declare a state of siege in one or more portions of the national territory in case of foreign aggression or internal disturbance, and to approve or suspend the

[1] See Araujo Castro, *Manual Civico*, p. 60, note.

state of siege declared by the executive power or its responsible agents in the recess of the congress (sec. 21); to regulate the conditions and the process of election to federal office throughout the land (sec. 22); to legislate on the civil, commercial, and criminal law of the republic and on the federal judicial procedure (sec. 23); to establish uniform laws of naturalization (sec. 24); to create and abolish federal offices, determine their powers, and fix their remuneration (sec. 25); to organize the federal judiciary in accordance with the provisions of the constitution (sec. 26); to grant amnesties (sec. 27); to commute and pardon penalties imposed upon federal officers for official malfeasance (sec. 28); to legislate concerning the lands and mines belonging to the Union (sec. 29); to legislate on the municipal organization, police, higher education and other services reserved to the Union in the capital (sec. 30); to subject to special legislation the places in the national territory necessary for the location of arsenals or other establishments or institutions of federal convenience (sec. 31); to regulate the cases of extradition between the states (sec. 32); to enact the laws and resolutions necessary for the exercise of the powers belonging to the Union (sec. 33); to enact the fundamental laws for the complete execution of the constitution (sec. 34).

In comparing this enumeration of the powers granted to the federal congress in Brazil with that contained in article 1, section 8, of our own constitution it appears that every power granted in the latter appears in the former, either in express and almost identical terms or by inclusion in some other power. What is more remarkable, however, is the fact that the enumeration in the Brazilian constitution includes in addition a number of powers which in the United States are not accorded to the federal government; and the sum total of these additional powers is of such a nature as to differentiate the two systems in a fundamental manner.

Among these additional powers granted to the Brazilian congress the most important are the power to determine the boundaries of the states, the power to declare a state of siege, and the power to enact civil, commercial, and criminal law for the republic. Of less importance are the powers to establish banks of emission, to change the capital of the Union, to grant subsidies to the states, to regulate the conditions and procedure of elections for federal offices, and to regulate the cases of extradition between the states. These latter powers, though not expressly contained in the enumeration of powers of our federal congress, could be and in fact have been implied from other powers that are so granted.

The power of the national congress of Brazil to determine the boundaries of the states was a most important one in view of the uncertainties and disputes that existed among almost all of the ancient provinces when they were constituted states by the constitu-

tion of 1891. Both the draft of the commission of five and the draft of the provisional government entrusted to the congress the power of definitely determining the state boundaries. The committee of 21 of the constituent congress altered this provision so as to give the congress power only to approve boundary agreements entered into between the states and to determine disputes arising between the states in regard to such agreements. But on third reading the original provision was approved, according to congress the power to fix the boundaries.[1] In spite of this amendment, however, and in spite of the opinion of the author of the same that this gives the congress an initiative in the matter of determining state boundaries, the prevailing view seems to be that the congress can act only in ratification of agreements entered into between states in execution of article 4, and that other questions of interstate limits must be solved by the judicial branch of the government under its general jurisdiction over controversies between the states.[2]

The power to declare a state of siege and to approve or discontinue the state of siege declared by the executive power in the recess of the congress is a much broader power than the corresponding one indirectly given in the United States by article 1, section 9, paragraph 2: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." For this measure in Brazil may result in suspending many of the constitutional guaranties of individual rights enumerated under the head of "Declaration of Rights," in Title IV, section 2, of the constitution. Primarily, of course, this jurisdiction increases the power of the federal government over against the individual citizens, not as against the states, and for that reason a consideration of this fundamental article belongs properly under the discussion of these individual guaranties. But as a powerful weapon in the hands of the authorities, and particularly of the executive, who may invoke it himself when the congress is in recess, and wields it himself even when invoked by the congress, it contains possibilities of political domination in the affairs of the states which makes it a valuable auxiliary to the power of federal intervention already considered. But this feature of the power will be considered also in connection with its more detailed examination elsewhere.

Of direct and determinative significance in the extent of federal attributes, and of especial significance because of the radical departure from the North American model, is the grant of power contained in section 23 of article 34, "to legislate on the civil, commercial, and criminal law of the republic," as well as on federal procedure. Two important principles are established by this section of the constitu-

[1] See Freire, Felisbello, *Historia Constitucional*, etc., Vol. III, pp. 100–105.
[2] See Araujo Castro, *Manual da Constituição Brasileira*, p. 99.

tion: the unity of substantive law and the duality of adjective law or procedure.

To understand the fundamental departure from the American model involved in conferring upon the federal congress the power to legislate on civil, commercial, and criminal law for the whole republic, it is necessary to recall again the fundamental difference in the situation existing at the time of the creation of the federal system in the two countries. In North America the thirteen former colonies each possessed its own system of law, similar, indeed, because based on the English common law in force at the time of the Declaration of Independence, but legally distinct. To have given the government of the United States the power to legislate for the entire country in matters of civil and criminal law would have been to take away from the colonies another and fundamental power which they already possessed and exercised, and the complete unification of which was not considered imperative for the accomplishment of the ends for which the federal government was created. The Philadelphia convention contented itself, therefore, with assigning to the legislative competence of the national congress such branches of the law as were considered essential to the accomplishment of the national objects for which the federal government was instituted. Such was legislation regarding naturalization, bankruptcies, crimes on the high seas, offenses against the law of nations, etc.

In Brazil, on the other hand, at the time of the establishment of the federal republic, there was in force national law in all its branches civil, commercial, and criminal. The civil law of Brazil at the close of the empire had not been codified, though numerous attempts had been made in that direction and a commission had been named again in the last year of the empire to do so. A commercial code had been adopted in 1850 and a criminal code in 1830. The provinces of the empire had, it is true, been granted provincial legislatures by the *Acto Addicional* of August 12, 1834, and collections of provincial laws dating from 1835 exist for most of the states. But the scope of this power was very limited and as has been seen was still further restricted by subsequent interpretation and legislation. It never amounted to a general power of legislation regarding matters of civil, criminal, or commercial law.

In spite of this situation, however, there were not lacking supporters among the founders of the new federal order of the proposal to endow the new-born states with the general power over civil and criminal legislation, to the extent and in the manner in which the states of our Union possess it. By order of the minister of justice of the provisional government itself, on November 21, 1889, less than a week after the proclamation of the federal republic, the commission appointed in the preceding June by the imperial government to pre-

pare a civil code was dissolved. The reason given for this act was that the enactment of laws regulating the civil relations of the citizens of the various states did not come within the legitimate sphere of action of the federal government, but fell within the initiative and independent jurisdiction of the legislatures of the states.[1] In this sense the commission of five provided in its draft of the federal constitution that the federal congress could within a period of five years codify the civil, commercial, and criminal laws of the nation as well as the laws of procedure, but that the states should be free to modify such laws in the sense of adapting them to their peculiar local needs. It provided, furthermore, that if such federal codification had not occurred within the space of five years the states should be free to make such a codification for themselves. But this particularistic tendency was negatived in the revision which the provisional government made of the draft constitution to be submitted to the constituent congress. In the government project issued on June 22, 1890, and revised by decree of October 23 of the same year, we find the power to codify the civil, criminal, and commercial law of the republic and of federal procedure granted to the federal congress in almost the same terms as are now contained in the section of the constitution under consideration. The expression "codify the laws" is used instead of "legislate on," but there is no power reserved to the states to modify federal laws. The laws in force at the time of the overthrow of the empire were retained in effect so far as not contrary to the constitution and not modified by subsequent legislation.

The provisional government acted on this principle of unified legislation, while in the constituent congress voices were being raised in favor of the principle of plurality of legislation as encountered in the United States of America. Decrees regulating corporations, mortgages, civil marriage, agricultural contracts, the Torrens system of land registration, laws of judicial procedure, enacting a criminal code, amending the commercial code, and affecting the legal system in a variety of other ways were promulgated before the draft constitution of the government had been decreed as well as during the sessions of the constituent congress. Meanwhile, the commission of five and many members of the constituent congress were declaring themselves against the system of unified legislation. But the views of the provisional government as expressed on this point prevailed, both in their draft code and in their actual legislative decrees, and the constitution definitely established the principle that substantive law should become, or rather remain, a concern of the national government. The codification of the civil law, demanded already by the constitution of 1824 and undertaken on various occasions both during

[1] Barbalho, *op. cit.*, p. 126.

the empire and after the establishment of the republic, did not actually occur until January 1, 1916, going into effect a year later.

As regards adjective law, or the law of procedure, the federal government was restricted by the constitution to the regulation of federal procedure, that is, procedure before the federal courts. It was equally true that this was a matter which during the empire had been regulated by national law, for although the provinces had been accorded the right to organize the inferior courts and to appoint and remove their judges by the *Acto Addicional* of 1834, including the power to fix the procedure, this latter right was expressly denied by an order of December 12, 1836.[1] In 1889, therefore, the procedure in all judicial cases in Brazil was regulated by national laws; and yet the government project of the constitution limited the legislative powers of the national congress in matters of judicial procedure to the regulation of federal procedure, and the constituent congress accepted that limitation. The explanation of this limitation of the federal legislative power seems to lie in the fact that it was considered that the states being accorded the right to organize their own judiciary, the laws of procedure were to be regarded as forming part of this judicial organization.

It is interesting to remark, in connection with the provisions of section 23, that whereas commentators like João Barbalho deplored the spoliation of the states of the power of general legislation in civil and criminal matters and regarded the reservation of the power over judicial procedure as a meager act of justice,[2] there is to-day a strong current of authoritative opinion in Brazil in favor of extending the jurisdiction of the federal government over matters of procedure as well.[3]

So far we have been considering only those powers of the national congress which are designated by the constitution as exclusive. Other powers are granted to the congress, however, which while expressly denominated non-exclusive, or what we should call concurrent powers, nevertheless open up a field of federal action of real significance. These concurrent powers are contained in article 35 in the following terms:

1. To watch over the safety of the constitution and the laws, and take measures regarding necessities of a federal character;
2. To encourage in the nation the development of letters, arts, and sciences, as well as immigration, agriculture, industry, and commerce, without privileges that might hinder the action of the local governments;
3. To create institutions of secondary and higher instruction;
4. To provide secondary instruction in the federal district.

[1] Rodrigues, *Constituição Politica*, p. 183, n. 2. [2] Barbalho, *op. cit.*, pp. 126–129.

[3] In the juridical congress held in Rio de Janeiro in October 1922, a number of prominent constitutional lawyers expressed themselves in favor of a unified law of procedure, though this would require an amendment to the constitution.

Mention has already been made of the peculiar character of section 1,[1] which in effect merely recognizes the duty of the states also to safeguard the federal constitution and laws, but does not confer on the national congress any powers it does not already possess by virtue of other express provisions of the constitution.

With regard to the powers contained in section 2, Barbalho points out the significance of the expression "encourage the development" as distinguished from the terms "create" and "provide" employed in sections 3 and 4. The Union, therefore, is to assist the states in their efforts in these matters rather than take unto itself the developing of these phases of activity, especially as privileges which would hinder the action of the local governments are forbidden. Nevertheless, the share of the federal government in these fields has tended to increase in recent years, principally because of the failure of most of the states, either through indifference or financial inability, to undertake properly the "development" which the federal government by the terms of this section is to encourage or stimulate. It is to be noted, moreover, that as regards the encouragement of letters, arts, and sciences, the constitution imposes upon the national congress the duty of protecting authors and inventors by patent and copyright laws,[2] as well as granting the power, in the next section of the article under consideration, to create institutions of secondary and higher instruction; and as regards the development of immigration, agriculture, industry, and commerce, the federal government has already a broad field of action by reason of its control over interstate and foreign commerce.

A favorite method by which the federal government exercises its right to encourage the development of letters, arts, and sciences, aside from the maintenance of institutions of instruction, is that of according to institutes and academies of a literary or scientific character the designation of enterprises of public utility with indirect and direct subsidies from the federal treasury. Such undertakings tend more and more to look to the federal treasury for aid, though some of the more advanced states are encouraging them out of their own resources also.[3]

As regards the matter of immigration, the federal government has recently stepped in to remedy the defects which manifested themselves under the system of state regulation. All of the southern states of Brazil have gone into the immigration problem more or less effec-

[1] See *ante*, p. 22, n. 3.

[2] Constitution of Brazil, art. 72, secs. 25–27.

[3] The national budget for 1922 contains an item headed "subventions," which enumerates the direct money grants by the federal government to educational and charitable institutions, as well as literary and scientific institutes and academies, in the various states. The total number of beneficiaries runs into the hundreds, and the grand total of appropriations under that head amounts to more than 4,000 contos de reis, or, say, more than a million dollars at normal rate of exchange.

tively, especially the state of São Paulo, but the need of federal aid and supervision has made itself more and more clearly felt. A comprehensive decree of November 3, 1911, goes very fully into the subject of immigration and colonization. In the field of commerce one of the most striking instances of the invocation by the states themselves of federal aid was the undertaking known as the "valorization of coffee," in which the powerful and otherwise self-sufficient state of São Paulo invoked the financial aid of the federal government in order to maintain the price level of coffee exports.

In general, the pressure upon the federal government to spend money in the exercise of the powers granted in this section of article 35 concurrently to the nation and to the states has been steadily increasing, and with it, of course, the relative influence of the federal government in comparison with that of the states. These are functions that are important for the nation as a whole, but especially for the particular regions benefited, as, for instance, in the well-known irrigation projects in the northeastern states, and their performance depends in most cases upon federal initiative. It is obviously impossible to measure accurately the extent to which that tends to strengthen the federal government at the expense of the states, but it is equally obvious that we have here a powerful factor of political and administrative centralization.

Through its power to create institutions of secondary and higher instruction the federal government holds the whip hand over the educational system of the country, even though this power is concurrent with that of the states and although the latter retained direction of elementary education. For since the federal government has the power to prescribe the educational requirements not only for the federal offices and employments, but also for the practice of the professions,[1] it can standardize the system of higher education, and as a practical matter the education preliminary to such technical and professional training. The former it has done by decree of April 5, 1911, promulgating the law governing higher education.[2] The latter it has not yet undertaken, but it is not beyond the bounds of possibility that it will so do. It is perhaps significant of future developments in this field that whereas Barbalho in his commentaries published in 1902 voices his opinion that "however precious may be the advantages of public instruction it is certain that this is absolutely not a matter of direct and immediate interest for the nation and therefore not a matter of national concern and is outside of the scope of action of the federal government,"[3] more recent opinions are to the effect that

[1] This being a matter of administrative law, it is subject to the concurrent powers of the States. Araujo Castro, p. 252.

[2] Modified by decree No. 11, 530, of March 18, 1915.

[3] Barbalho, *op. cit.*, pp. 135, 136.

it was one of the great mistakes of the constitution of 1891 that it left elementary education to the states.[1] It is now coming to be the accepted doctrine that the federal government may establish its own or subsidize other elementary schools in the states.

Section 4 of this article authorizing the federal congress to provide secondary education in the federal district is of little significance as regards the division of functions between nation and states, except with reference to the rather peculiar position of the federal district as an entity in the federation, a matter on which more will be said at the proper place.

Articles 34 and 35, previously considered, contain the bulk of the powers granted to the national congress as an organ of the federal government, but a few others of more or less importance are scattered about in other portions of the constitution, some of which have already been considered. Of the remainder, the more important, so far as defining the jurisdiction of the federal government is concerned, comprise the power to define disqualifications for election to the federal congress (article 27); the determination of the number of deputies in the lower house (article 28, section 1); the approval of conventions entered into between the states (article 48, section 16); and the amendment of the federal constitution in the manner discussed later on (article 90).[2]

POWERS OF FEDERAL EXECUTIVE.

While the bulk of the powers conferred upon the national government by the constitution are included in the enumeration of the powers of the Union in the introductory articles, and of the congress in articles 34 and 35 and the others noted above, some of the powers granted to the executive enlarge the scope of action of the federal government even beyond that enumeration. These are contained in article 48 of the constitution. Here again we find the use of the word "exclusively" (*privativamente*) in connection with the assignment of the powers granted, and here again Barbalho insists that the word so employed means to exclude the action of the state governments, not of the other branches of the federal government. But it is as true in this connection as in relation to its employment with regard to the powers of the congress noted above that the attributes of the president defined herein are clearly assigned to him in exclusion of the participation of the other branches of the federal government.

So far, however, as this enumeration accords powers to the federal government not already otherwise granted, the following are the most important: the power of the commander-in-chief of the armed forces of the nation; and the power to maintain relations with foreign states

[1] Dr. Mauricio de Medeiros, in an article on "Public Instruction in Brazil," published in the centennial number of *La Nación*, of Buenos Aires, p. 98.

[2] See p. 50 below.

in the negotiation of treaties and in the sending and receiving of diplomatic representatives. These provisions therefore establish the supremacy of the national government in military and international matters, a supremacy indicated, moreover, if not expressly established in other provisions of the constitution. In this connection attention might be called to section 3 of article 7, which provides that the laws of the Union and the acts and judgments of its authorities shall be executed throughout the land by federal officers, and of this body of officers the president is the chief. The Brazilian federation, therefore, adopts the American principle of a complete federal hierarchy rather than the practice of the German imperial federation in making use of the state administrative machine to carry on the executive functions of the nation. It is to be noted, however, that the article in question expressly permits the enforcement of the laws to be entrusted to the governments of the states, with their assent.

JUDICIAL POWERS OF THE FEDERAL GOVERNMENT.

The constitution of Brazil followed the example of the North American Union in creating a separate judicial organization for the federal government, paralleling the judicial organization of the states. Moreover, in defining the jurisdiction of the federal courts, the constitution not merely assigned to them the cases which by their nature should be tried by the national tribunals, but also gave them by express grant the right to review decisions of the state courts in the cases defined by our first judiciary act.

The judicial power of the federal courts in Brazil is closely modeled on the provisions of article 3 of our constitution, but as has already been noted, in connection with various other constitutional questions, the Brazilian instrument includes express provisions regarding some matters which in the United States developed out of the constitution by subsequent amendment, legislation, or judicial interpretation.

Article 60 enumerates the cases to which the federal judicial power extends as follows:

(*a*) Cases in which either party bases its action or defense on provisions of the federal constitution;
(*b*) Cases against the government of the Union or the national treasury based on provisions of the constitution, on laws or regulations of the executive power, or on contracts entered into with the national government;
(*c*) Cases arising out of claims for compensation, recovery, or indemnity for damages or any others instituted by the government of the Union against individuals, or vice versa;
(*d*) Cases between a state and citizens of another state, or between citizens of different states when the laws of such states are different;
(*e*) Suits between foreign states and Brazilian citizens;
(*f*) Actions brought by foreigners and founded either on contracts with the government of the Union or on conventions or treaties of the Union with other nations;

(*g*) Cases of maritime law and navigation affecting either the high seas or the rivers and lakes of the land;
(*h*) Questions of international law, civil or criminal;
(*i*) Political crimes.

Article 59 defines the jurisdiction of the federal supreme court as follows:

The federal supreme court shall have
I. Original and exclusive jurisdiction over
(*a*) Trial of the president for ordinary crimes and of the ministers of state in the cases enumerated in article 52;
(*b*) Diplomatic ministers in ordinary and official crimes;
(*c*) Suits and controversies between the Union and the states, or between two or more states;
(*d*) Suits and claims by foreign nations against the Union or the states;
(*e*) Conflicts between the federal judges or courts with each other or with those of the states, as well as those between the judges or courts of one state with those of another.
II. Appellate jurisdiction over decisions of the federal judges and courts as well as over matters enumerated in section 1 of article 59 and in article 60.
III. Jurisdiction to review final judgments in criminal cases in conformity with article 81.
Section 1. Appeal shall lie from the decisions of the courts of last instance in the states to the federal supreme court;
(*a*) When the validity or application of the federal laws and treaties are drawn in question and the decision of the state court is contrary thereto;
(*b*) When the validity of laws or acts of the governments of the states is contested in view of the federal constitution and laws, and the decision of the state court upholds the validity of such acts and laws.
Section 2. In cases in which state laws are to be applied, the federal judiciary will consult the jurisprudence of the local courts, and vice versa.[1]

From the above definition of the judicial power of the federal government it is seen that it is even more extensive than in the United States, since the limitation of the eleventh amendment of our constitution has not been introduced into that of Brazil. It makes it quite clear that the ultimate authority on all questions of conflict between the rights and powers of the states on the one hand and those of the federal government on the other are to be determined by the latter.

Even the jurisdiction that is left to the state courts, that is, in ordinary civil and criminal cases, is subject to review by the federal supreme court on *habeas corpus,* that is, in case of unlawful detention of any kind, and in cases involving the estates of foreigners when not covered by treaty or convention (article 61). By article 62 the state judiciary are expressly forbidden to intervene in questions submitted

[1] By section 1 of article 60 the congress is forbidden to confer any federal jurisdiction on the state courts, and by section 2 of the same article the judgments of the federal courts must be executed by federal judicial officers, to whom the local police are obliged to render assistance when requested by them.

to the federal courts or to annul, alter, or suspend their decrees or judgments. The same prohibition is imposed upon the federal courts with regard to the jurisdiction of the state courts, but subject to the exceptions already noted.

In view of the great freedom of appeal that enables the validity of state legislative and executive acts, as well as the correctness of state judicial decisions, to be questioned in the federal courts, the provisions of the constitution defining the federal judicial power must be regarded as emphasizing the rôle of the national government in all matters of disputed powers. This jurisdiction is defined in the constitution in almost the identical form in which it was defined in the constitutional draft of the provisional government; but it was that portion of the draft which was the most actively discussed in the constitutional convention and which was made the object of the most numerous and far-reaching amendments.[1] Nevertheless, except in a few unimportant respects the government project was adopted without change. It is to be remembered, however, that by decree No. 848, of October 11, 1890, the provisional government had already organized the federal judiciary on the basis of the draft constitution of June 22 of the same year. When the constituent assembly met, therefore, on November 15, 1890, the principles of the judiciary articles of the federal constitution had already been put into effect. There was a strong current of opinion that the unified system of legislation already sanctioned by the preceding article of the constitution demanded a unity of courts as well. It was proposed to leave to the states only the creation of courts of first instance, there being as higher courts one sectional federal court for each state. In the committee of 21 of the constituent congress this plan at one stage of the proceedings even received a majority vote, but in a subsequent vote it was rejected and the government draft accepted, practically without modification.

The provisions of the draft constitution prepared by the original commission of five accorded a less extensive judicial power to the federal government, but in this respect, as well as in others already noted or to be noted later on, the revision of this draft by the provisional government accentuated the tendency toward greater centralization, or rather toward according to the central government a larger measure of power.

POWERS GRANTED TO THE STATE GOVERNMENTS.

Under the general theory of the distribution of powers between states and nation in Brazil it would not be necessary for the constitution to enumerate the powers granted to the states, since, as has

[1] See Freire, *op. cit.*, Vol. III, Ch. XIII.

been seen, by article 65, section 2, they enjoy all powers not denied them by express or implied provision of the federal constitution. Nevertheless, since there might be some question as to the exact extent of powers so denied, especially as regards those implicitly denied, the constitution enumerates a considerable number of powers which are thus explicitly guaranteed to the states. The most important of these will be considered briefly at this point. Some of them are so closely bound up with provisions conferring powers on the federal government that they were necessarily touched upon in the consideration of the latter.

To understand the full significance of the powers conferred upon the Brazilian states by the federal constitution of 1891, it is important to recall again that the provinces of the empire which were erected into states by that document possessed virtually no powers of any kind, certainly none that had successfully withstood the centralizing tendencies of the empire.

SELF-GOVERNMENT.

The most fundamental of the powers explicitly guaranteed to the states by the constitution is that contained in article 63, which reads:

> Each state shall be governed by the constitution and laws which it may adopt, in conformity with the constitutional principles of the Union.

This power to frame their own constitutions and laws is obviously of the greatest importance if the states are to enjoy any real measure of autonomy. This was a right guaranteed to the new states in the very first act of the provisional government.[1] But it was a right which, in that same decree, was limited by the power of the provisional government to establish temporary governments in the states and by the later decree instructing the centrally appointed governors to draft constitutions. Decree No. 1 of the provisional government had also, as has already been noted, insisted upon the maintenance of a republican form of government in the states and had reserved the right to intervene in case of public disturbance.

The commission of five that prepared the first draft of the constitution had qualified the right of the states to draft their own constitutions in the corresponding article,[2] by the requirement that they should conform to the republican *régime* and the fundamental principles contained in the constitution. It then went on to enumerate in considerable detail what those principles required: election of the governor, separation of powers, suffrage for federal offices based on the federal requirements, etc. At the same time the draft assured to

[1] Decree No. 1 of November 15, 1889: "Art. 3. Each of these states in the exercise of its legitimate sovereignty will adopt at the proper time its definite constitution, electing its deliberative organs and its local government."

[2] Article 71 of the draft of the commission of 5 of the provisional government.

the states the right to organize their own judiciary, their own armed forces, their own system of elementary education, etc. The draft of the provisional government itself, revising that of the commission of five, reaffirmed the right of the states to govern themselves according to their own constitutions and laws, providing, again, that the republican form were respected and the constitutional principles of the Union preserved and certain rules observed. These latter required that the three powers of government be distinct and independent, that the executive and members of the legislature be elective, that the judges be not elective and that they be removable only by judicial condemnation, and that instruction be laic in all grades and free in the primary grades.[1]

But the constituent congress considered the rules laid down in the government draft as derogating from the sovereignty of the states under a true federation, and it therefore amended the draft by striking out those rules, leaving only the qualification now found in this article, namely, that the constitutional principles of the Union be respected. The requirement of a republican form of government for the states had already been sanctioned in the article on federal intervention heretofore discussed.

What, then, are the constitutional principles of the Union which must be observed by the states in framing the laws and constitutions for their own government? Obviously, not every governmental provision laid down in the federal instrument, as, for instance, the bicameral organization of the legislature, the method of impeaching the chief executive, the non-reëligibility of the executive, etc. There have not been lacking jurists who have maintained that in spite of the action of the constituent congress in striking out the rules contained in the government project the states should follow in detail the governmental organization of the Union, as, for instance, with regard to the principle of non-reëligibility of the executive. But the view set forth by Barbalho, namely, that divergence is permitted so long as it does not relate to fundamental questions,[2] seems more in accord with the ideas intended to be incorporated in this limitation. Even that interpretation leaves open the question of what are such fundamental principles, a question which that commentator answers as follows: "The liberty of the individual and its guaranties: democracy, political representation, the republican form, and the federal *régime.*"

Included in his concept of the republican form are the requirements of rotation in public office and the political and civil responsibility of the officers; in that of the federal *régime,* the autonomy and political equality of the states. The separation of powers into three branches,

[1] Decrees Nos. 510 and 914A of the provisional government.
[2] Barbalho, *op. cit.*, p. 267.

moreover, is considered by the commentator to be a fundamental, inasmuch as without it liberty is not secure, and the federal constitution also refers distinctly to the three branches of government in the states. Finally, the right to amend the constitution when once adopted is regarded as a principle of every liberal and democratic government which must be incorporated into the fundamental laws of the states, especially as the federal constitution refers expressly in article 2 of the transitory provisions to this power of amendment.

The sanction of these limitations resides in the federal power of intervention and in the right of an individual to resort to the federal courts in case his individual rights are violated by provisions of the state constitutions or laws. But this sanction does not include a power on the part of the national congress to ratify or approve a state constitutional or legal provision before it becomes effective.

But the limitation of article 63, with respect to the constitutional organization of the states, is not the only one contained in the federal constitution. Article 68, for instance, stipulates that they shall organize their government in such a way that the autonomy of the municipalities shall be insured in respect to everything that concerns their own peculiar interests. This seems, at first sight, to be a true home-rule provision in the federal constitution for the benefit of the municipalities within the states. But in practice it has so far proved of limited importance.

With regard to the position of the municipalities within the states, both the original draft of the commission of five and the revised draft of the provisional government included rather detailed stipulations concerning the elective nature of the municipal authorities, the right of foreigners to vote, and the autonomy of the municipality in matters of local concern. But it was argued in the constituent congress that the detailed regulation of municipal government was a matter which did not properly fall within the sphere even of the imperial government after the *Acto Addicional* of 1834 and should not, therefore, be specified in the federal constitution of the republic. Nevertheless the constituent congress retained this general stipulation in favor of municipal autonomy. An amendment was offered, indeed, conferring upon the municipalities the same power of constituting their own governments within the limits of the state constitution as was conferred upon the states within the limits of the federal constitution, but, although the advantages of municipal autonomy were clearly expounded and generally accepted, the amendment in question was rejected on the ground of undue interference with the power and right of the states to organize their governments according to their own desires. The actual interpretation of what is meant by autonomy

in respect to matters of peculiar interest to the municipalities is left in practice to the states themselves.[1]

FINANCIAL POWERS.

Next to the fundamental power of organizing their own governments, the most important power expressly accorded to the states by the constitution is that with regard to finances. Indeed, as the experience of the provinces during the time of the empire proved, local autonomy was of little significance in practice if unaccompanied by the means for raising the necessary revenues. Accordingly, as is pointed out by Felisbello Freire, there was more concern among the advocates of federalism about the financial independence of the new states under the republican *régime* than about their political independence.[2]

Article 9 establishes the sources of revenue which belong exclusively to the states, excluding the federal government, as will be seen, from certain sources which in the United States of America are open to the Union concurrently with the states. These sources of revenue are enumerated under the following heads:

1. Taxes on the exportation of goods of their own manufacture;
2. Taxes on rural and urban real estate;
3. Taxes on the transfer of property;
4. Taxes on industries and professions;

SEC. 1.

1. Stamp taxes on documents issued by the state governments and on transactions of their own economy;
2. Revenues of their own telegraphs and postal services.

At the same time states are forbidden to impost export taxes on the production of other states which are shipped through the ports or borders of the former,[3] while they are permitted to levy import taxes on foreign goods only when destined for consumption within their own limits, the revenues from such taxes, moreover, being turned over to the federal treasury.[4]

The history of these provisions with regard to the financial powers of the states is full of interest and significance, but can only be very briefly surveyed here.[5] As has already been noted, the provinces under the empire possessed no definite financial powers even after the *Acto Addicional* of 1834, which was intended to insure them a larger measure of financial and political autonomy, for this amendment to the imperial constitution granted to the provinces only such sources

[1] On this whole question of the position of the municipality in Brazil, see Castro Nunes, *Do Estado Federado e sua Organização Municipal.*

[2] Freire, Felisbello, *Historia Constitucional da Republica*, Vol. III, p. 32.

[3] Art. 9, sec. 2.

[4] Art. 9, sec. 3.

[5] For a fuller discussion of this history, see Barbalho, *op. cit.*, pp. 34–39, and Freire, *Historia Constitucional*, Vol. III, pp. 32–54.

of income as would not prejudice the general revenues of the nation, expressly prohibiting import taxes. It has also been pointed out that the financial paralysis of the provinces resulting from this system led not only to open violations of the prohibitions of the constitution in this regard, but constituted one of the powerful factors in furthering the republican federal propaganda.

The draft constitution of the commission of five assigned to the states as exclusive sources of revenue the taxes on exports originating in the state itself, but prohibited export taxes of every kind, commencing in 1897; the land tax; and the tax on transfer of property; including also the right to tax imports destined for consumption within the state and assigning the revenues thereof to the national treasury. The draft of the provisional government of June 22, 1890, modified these provisions to the extent of changing the time from which export duties should cease to 1895. In the subsequent decree of October 23 this was again altered to permit the congress to abolish export taxes at any time, and in any case they were to cease in 1898. These provisions were made the subject of exhaustive discussions and important amendments both by the committee of 21 of the constituent congress and from the floor of the house itself, resulting finally in the addition of taxes on buildings, taxes on industries and professions, taxes on documents validated by the state governments in state business, and revenues from state posts and telegraphs. Amendments enlarging still more the exclusive taxing power of the states were proposed and ably defended, but finally failed of passage. Among such amendments, for instance, was one proposed by the committee of 21 of the constituent congress which would allow the states to collect an import tax of 10 per cent additional on imports destined for consumption within the state. The proposal to eliminate the time limit for state export taxes was, however, accepted.

The grant to the states of this right to tax exports is, of course, a striking departure from the American model, in which export taxes are expressly forbidden, and, as could be seen from the time limit set to the exercise of this power in the various drafts of the constitution, it was recognized as undesirable even at the time. But the economic development, or perhaps, better, the lack of development, of the states at the time the constitution was framed made it seem probable that without this source of taxation the revenues of the states would for many years be quite insufficient to meet the necessary expenses of their administration. For a generation, in fact, the export taxes constituted the principal source of income for the states, but of recent years, especially in the more advanced states, they have played a diminishing rôle in comparison with other sources of income.

There is a very pronounced current of opinion in Brazil to-day that this power to tax exports is a most unfortunate power, especially as

it is exercised not merely with regard to exports to foreign countries but to other states of the Union as well. This question of the power of the states to tax their products when exported to other states has had a curious history in Brazil. The history of the adoption of this provision would seem to sustain the contention of Barbalho that the power to tax exports was intended to refer only to goods shipped to foreign countries, though the provinces of the empire imposed export duties on goods shipped to other provinces. This was the opinion of the federal supreme court in its decision of May 23, 1896. But in consequence of this decision the congress enacted a law of November 12, 1896 (No. 410), expressly recognizing this right of the states to tax exports to other states, and the supreme court in two judgments (Nos. 92 and 98) of February 13 and 17, in 1897, reversed its decision and adopted the view expressed in the law of 1896.[1] In its decision No. 412, of October 19, 1910, however, the supreme court again declared export taxes on goods sent to another state unconstitutional, only to reverse its position again in decisions Nos. 3,364 and 3,365, of November 9, 1918.[2]

A constitutional question similar to that with regard to state export taxes on goods sent to another state presents itself in regard to import taxes on goods coming not from foreign territory but from another state. The federal constitution assigns to the Union, as has been seen, the exclusive power to impose import duties. But in this connection the constitution employs the words "of foreign origin," whereas it suppressed the corresponding words "to foreign countries" in connection with the exclusive power of the states to tax exports. The inference might have been drawn, therefore, that the states possessed the power to tax imports from other states under their general power to exercise all jurisdiction not exclusively assigned to the Union or not forbidden to them. In fact, the states of the Union, continuing a practice followed by them as provinces of the empire, resorted to the taxation of imports from other parts of the country under a variety of forms. But such laws have repeatedly been declared contrary to the constitution by the federal supreme court on a variety of grounds. One of the most authoritative commentators on the constitution of Brazil maintains, however, that these decisions are unsound.[3] By a federal law of 1904 (No. 1,185), however, the sole conditions under which a state can impose taxes on goods brought into the territory, whether from abroad or from another state, were established, thus expressly forbidding such taxation of goods coming in from other states.[4] The right of the states to impose import taxes on goods coming from foreign countries and destined for consumption within

[1] See Cavalcanti, Amaro, *Regimen Federativo*, pp. 304–310.
[2] Araujo Castro, *Manual da Constituição Brasileira*, pp. 44, 45.
[3] A. Cavalcanti, *O Regimen Federativo*, pp. 274–301.
[4] Araujo Castro, *op. cit.*, p. 47.

the states, expressly established by section 3 of article 9, is also a departure from our practice, and although intended merely as a matter of protection for the products and industries of the states, since the proceeds from such taxes accrue to the federal treasury, is recognized as another unfortunate feature of the Brazilian system of division of taxing powers between Union and states. As a matter of fact, this power has not yet been employed to any extent by the states, but it is filled with dangerous possibilities.[1]

Other constitutional questions have arisen with regard to the exclusive taxing powers accorded to the states by article 9, but space does not permit of entering upon them here. Taxes on real estate had already been levied by the provinces under laws enacted in 1834 and 1835 and also in limited form taxes on the transmission of property. Even up to the present time, however, land taxes in most of the states furnish a relatively small part of the state revenues, though the proportion tends to increase in the more advanced states. Taxes on industries and professions had not been authorized for the provinces, though such a measure had been proposed under the empire, and they were not included among the sources of revenue assigned exclusively to the states by the draft of the commission of five, nor yet in the draft as revised by the provisional government. It was added upon motion of Lauro Sodré and accepted by the constituent congress. As a result of recent legislation regarding taxes on the income from the liberal professions, a constitutional question has arisen as to the relation of such a tax—income taxes being among the sources of revenue left open to both Union and states under article 12 of the constitution—to the exclusive power of the states to tax the professions themselves. There is also some question as to the meaning of the phrase in section 1 of article 9, which accords to the states the exclusive right to impost stamp taxes on instruments originating from their respective governments, and *transactions of their own economy*. Since it was a question of dispute what was meant by this italicized phrase, a federal law of July 31, 1899 (No. 585), defined the relative jurisdictions of state and nation in the field of stamp taxes by declaring that these transactions of the economy of the states were only such as are governed by state laws. Against this legislative interpretation, so severely restricting the sphere of action of the states in this matter, Barbalho enters an emphatic protest on the grounds of constitutionality.[2]

Among the more important sources of additional revenue open to the states, as well as to the Union under article 12, are the consumption taxes and the income tax.

[1] Araujo Castro, *op. cit.*, p. 40.
[2] Barbalho, *op. cit.*, pp. 36–39.

One other constitutional question of primary importance in relation to the financial powers of the states has been raised on various occasions. This refers to the power of the states and their municipalities to contract foreign loans. The ever-mounting indebtedness of the states of the Union and of their municipalities, most of which are absorbed by foreign investors, caused serious alarm more than twenty years ago in Brazil because of the international aspects raised by the failure to meet these obligations promptly. The prejudices caused to the credit of the national government by excessive foreign loans on the part of states and municipalities, the terms of which were not infrequently violated by the contracting governments, and the dangers inherent in the guaranty of such loans by liens on particular forms of revenue, led to the introduction into the national senate in 1912 of a bill which would prohibit the contraction of foreign debts by states and municipalities without sanction of federal law.

This bill was discussed at great length both as to its constitutionality and as to its expediency, a respectable current of opinion holding that such a power resided in the federal government under the constitution.[1] The prevailing opinion, however, was contrary to the possession of this power by the federal government, though there was general recognition of the inconveniences and dangers to the credit and prestige of the Union in the prevailing abuse of the power of incurring foreign indebtedness on the part of the states and their subdivisions. Though the constitutional power of the states to contract such loans without federal control is established, the danger of abuse is universally recognized to-day. In the farewell message addressed to the nation by President Epitacio Pessoa on November 15, 1922, the Minister of Foreign Relations, Dr. Azevedo Marques, laments the fact that his ministry was disturbed by insistent complaints by foreign creditors and bankers concerning the delay and defaults on the part of some of the states in paying their debts, although these creditors know that the Union is not responsible for the debts of the states. "The fact is," continues the Minister of Foreign Affairs, "that the states are an integral part of Brazil and the general credit of Brazil suffers."[2] He considers a radical legislative measure a matter of urgency to put obstacles in the way of the facility of contracting foreign loans offered to the states by unscrupulous intermediaries.

MISCELLANEOUS STATE POWERS.

Aside from the two fundamental state powers heretofore discussed, the powers expressly guaranteed to the states by the constitution are of distinctly secondary importance. They include the right to estab-

[1] This matter is fully and ably discussed in Viveiros de Castro, *Estudos de Direito Publico* (Rio de Janeiro, 1914), Ch. VII.

[2] *Jornal do Commercio*, November 16, 1922, p. 3.

lish telegraph lines within their own boundaries and to points in other states not served by federal lines, but subject to the power of the Union to expropriate them when required by considerations of general welfare;[1] the right to conclude agreements and conventions of a non-political character with each other, subject to the approval of the federal government;[2] and the concurrent powers to create other sources of revenue,[3] to legislate on matters of railways and interior navigation in conformity with federal laws,[4] and the concurrent powers contained in article 35 of the constitution to safeguard the federal constitution and laws, to encourage the development of arts, letters, and sciences, as well as immigration, agriculture, industry, and commerce, and to create institutions of secondary and higher instruction.

The most interesting of these miscellaneous state powers from the point of view of comparison with our own federal system is that with regard to railroads. This is really rather in the nature of a limitation than of a grant of powers, for it leaves to federal law the determination of the extent of this power to legislate on railroads and interior navigation. The provisional government had already adopted measures in this regard,[5] and the national congress in its first session passed a law defining the relative jurisdictions of the nation and the states in this field.[6]

One other express grant made by the constitution of 1891 to the states of the Brazilian Union is deserving of mention, and that is the grant of unoccupied mines and lands within their boundaries, save such only as might be required for the defense of the national frontiers, fortifications, military constructions, and federal railways.[7]

In the United States of America the public lands belonged to the individual thirteen colonies that formed the Union and they ceded to the federal government large areas to which they had laid claim. In Brazil, on the other hand, unoccupied lands belonged to the national government, except to the extent that express legislation had granted to the provinces definite amounts of land destined for colonization. The mines had been treated during the empire, as well as during the colonial period, as belonging to the state—that is, to the central government. This provision of the constitution of 1891 ceded to the states, therefore, property in all mines and lands formerly belonging to the nation, with the reservations noted above. The national congress retained merely a right of legislation over such mines and lands as were retained or might be acquired by the Union,[8] and, of course, such jurisdiction in this regard as flowed from its power to legislate

[1] Constitution of the United States of Brazil, art. 9, sec. 4.
[2] *Ibid.*, art. 65, sec. 1. [3] *Ibid.*, art. 12. [4] *Ibid.*, art. 13.
[5] Decree No. 159, of January 15, 1890.
[6] Law No. 109, of October 14, 1892, quoted in Barbalho, *op. cit.*, p. 45, note.
[7] Constitution of Brazil, art. 64. [8] *Ibid.*, art. 34, sec. 29.

in regard to substantive civil law in general (article 34, section 23). Article 64 also declared that national property so far as not necessary for the services of the Union should pass into the possession of the state in whose territory it was located. The *Acto Addicional* of 1834 had already promised a division of governmental property between the nation and the provinces, endowed as the latter were with a certain autonomy by that amendment to the imperial constitution. But this promised division never occurred, so that at the time of the constitution of 1891 the states were in a sense joint owners of an undivided interest in this property with the Union. Since the establishment of the republic, the national government has been prone to nullify this provision of the constitution by the simple process of declaring that all such property is necessary to the Union if only for the purpose of realizing money from its sale. In consequence, various of the states of the Union have had to pay for the purchase of buildings and other property from the federal government in which they already had an undivided interest and which the constitution expressly assigned to them.[1]

Constitutional questions of considerable importance have been raised regarding the relative jurisdiction of states and nation over tidal lands, river beds, escheats, etc., but they can not be considered here.[2]

POWERS DENIED TO THE FEDERAL GOVERNMENT.

One important field of powers denied to the federal government has already been outlined in the consideration of the powers granted exclusively to the states. In addition to this limitation, and to the fundamental limitation involved in the principle that the federal government is a government of specific powers and is prohibited from exercising any powers not granted expressly or by implication, there are, however, express provisions of the federal constitution that forbid certain kinds of acts to the national government. Some of these provisions relate solely to the federal government, while others include the states as well as the nation in the prohibition, and still others, viz., those establishing the rights of the individual, impose limitations on governmental action in general, wheresoever it may originate.

PROHIBITIONS ON THE FEDERAL GOVERNMENT.

The first important prohibition on the action of the federal government found in the constitution is that contained in article 6, which forbids that government from intervening in the peculiar concerns of the states, except in specified cases. This provision, which by

[1] See Barbalho, *op. cit.*, pp. 270–272.

[2] For an extensive treatment of these questions, see the monograph by Octavio, Rodrigo, *Do Dominio da União e dos Estados.* (Rio de Janeiro, 1897.)

reason of the exceptions specified constitutes in reality rather a grant than a limitation of powers, has already been considered.[1]

A second group of prohibitions relates to the federal taxing powers. Some of these limitations are couched in the form of positive requirements, as, for instance, the requirement that all federal taxes shall be uniform throughout the states,[2] and the stipulation that coastwise commerce of national products and of foreign imports that have already paid duties shall be free of port duties,[3] while others are expressed directly as prohibitions, such as the prohibition against creating in any manner distinctions or preferences in favor of the ports of any one state,[4] and the prohibition against taxing the property, revenues, or services of the states.[5] These limitations on the federal taxing power are all taken from our own jurisprudence, either by direct transcription from the constitution of the United States or by the incorporation of principles laid down in decisions of our supreme court, as is the case with the last-named prohibition.

One other limitation of the federal constitution applies solely to the federal government, namely, the prohibition upon the congress to confer any federal jurisdiction upon the state courts, and the requirement that the judgments and decrees of the federal courts shall be enforced by federal judicial officers, the state police being required to render assistance when invoked by such officers.[6] But this limitation, which was already included in the draft constitution of the provisional government, does not prohibit the federal government from imposing upon the state courts the duty of giving effect to the orders of federal courts regarding citations, examination of witnesses, etc., as was done by the provisional government itself in the decree (No. 848) of October 11, 1890, organizing the federal judiciary. In like manner the federal congress, by act of November 20, 1894 (law No. 221), applied the principle which was sustained by the supreme court in its decision of August 29, 1895. The failure of a state to comply with the requirement of this article as to lending aid in the execution of federal judgments would raise the situation in which federal intervention would be justified under the terms of article 6, section 4, of the constitution, previously considered.

POWERS DENIED TO BOTH STATE AND FEDERAL GOVERNMENTS.

Article 11 of the constitution expressly enumerates the following prohibitions as applying to both states and Union:

1. To impose transport taxes on the passage through one state or from one state to another of products of other states or of foreign countries, as well as taxes on the vehicles used on land or water for such transportation;

[1] See *supra*, pp. 15–20.
[2] Constitution of Brazil, art. 7, sec. 3.
[3] *Ibid.*, art. 7, par. 1.
[4] *Ibid.*, art. 8.
[5] *Ibid.*, art. 10.
[6] *Ibid.*, art. 60, secs. 1 and 2.

2. To establish, subsidize, or embarrass the exercise of religious worship;
3. To enact retroactive laws.

This prohibition on the taxing of commerce in transit either by the federal government or by the states, though not included in the draft of the commission of five, was included along with the other two paragraphs of this article in the draft of the provisional government and was accepted without the slightest change by the constituent congress. It was intended to insure complete freedom of interstate commerce and has been interpreted to apply to imposts by municipalities within the states themselves as well as to the states and the federal government.[1]

Under the empire there was a close union between church and state, the constitution of 1824 recognizing the Roman Catholic Apostolic religion as the religion of the empire, though tolerating the private practice of other religions.[2] One of the early acts of the provisional government, however, forbade acts of either the federal government or of the state governments establishing or prohibiting any religion or making any distinction between the inhabitants of the country based on religious or philosophical belief or opinions.[3] The draft constitution of the commission of five prepared in the same year prohibited official subvention to any religious cult, and the draft constitution of the provisional government established the prohibition on the establishment, subvention, or embarrassment of religious worship in the identical terms retained in the instrument as finally adopted by the constituent convention.

Reinforcing this separation of church and state is the provision of a later article[4] making ineligible for voting in either state or federal elections members of monastic orders or religious congregations of any sort which require of their members a renunciation of their individual freedom of action. Still further provisions intended for the same end are enumerated more in detail in the declaration of rights, the significance of which will be examined in another place. It may suffice to point out here that in virtue of the express prohibition of this article on the states, as well as the Union, the Brazilian constitution assures a more complete freedom of religious worship than does our own federal instrument, which in the first amendment restricts only the action of the national congress.

The third prohibition contained in the article under consideration, namely, on the enactment of retroactive laws, expresses in a single phrase the prohibitions contained in several different provisions of our constitution,[5] though it is to be noted that our constitution does

[1] Barbalho, *op. cit.*, p. 41.
[2] Constitution of the Empire of Brazil, art. 5.
[3] Decree of the provisional government No. 119A, January 7, 1890.
[4] Constitution of Brazil, art. 70, sec. 1, par. 4.
[5] Constitution of the United States, art. 1, sec. 9, par. 3; art. 1, sec. 10; amendment 5.

not expressly forbid the federal government to enact civil laws of retroactive effect. This prohibition in the Brazilian constitution was, however, merely continued from the imperial constitution of 1824[1] and was adopted without change from the draft constitution of the provisional government. But this prohibition applies only to laws, civil or criminal, the retroactivity of which would prejudice individual rights. So laws may be passed that relate to facts anterior to their passage if they work no such prejudice. Among such, Barbalho enumerates constitutional or political laws; laws controlling the exercise of political and individual rights, or the requeites for public office; declaratory or interpretive laws; and penal laws that eliminate or diminish a penalty established by a prior law.[2]

Another important limitation on both state and national governments is contained in article 70, section 1, which prohibits certain classes of persons, such as beggars, illiterates, common soldiers, and members of religious orders, from being registered as voters in either state or federal elections.

Most fundamental and comprehensive of all the limitations established by the constitution as checks on the government are those embodied in the so-called declaration of rights, articles 72–78. These are included among the constitutional principles of the Union which the states, in accordance with article 63, already discussed,[3] must observe in the framing of their constitutions and laws. They constitute limitations, therefore, on both state and national governments and are of such basic importance that special consideration of them will be given in another place.

POWERS DENIED TO THE STATE GOVERNMENTS.

In addition to the powers which are denied to the state governments equally with the national government, which have just been briefly enumerated, there are other limitations expressly referring to the states alone, thus further restricting the sphere of action which, under the general theory of the distribution of powers between states and nation, would otherwise be open to the states. Here again it must be remembered that these limitations are in addition to those which result from the grant to the federal government of exclusive powers and of powers which, though concurrent, are exercisable only to the extent that they do not conflict with the exercise of those same powers by the federal government.

The powers expressly denied to the states by the constitution are the following:

1. To tax the products of other states destined for exportation (art. 9, sec. 2);
2. To tax federal property, revenues, or services (art. 10);

[1] Constitution of the Empire of Brazil, art. 179, sec. 3.
[2] Barbalho, *op. cit.*, p. 42.
[3] See *supra*, pp. 35–37.

3. To intervene through their courts in causes submitted to federal tribunals, or to annul, alter, or set aside the judgments or decrees of the same (art. 62);
4. To refuse faith to the public documents of whatever nature of the Union or of any of the states (art. 66, sec. 1);
5. To reject the coin or bank notes authorized by the federal government (art. 66, sec. 2);
6. To make or declare war on each other or to resort to reprisals (art. 66, sec. 3);
7. To refuse the extradition of criminals demanded by the judges of other states or of the federal district in accordance with the laws of the Union governing this matter (art. 66, sec. 4).

These are all powers, as is readily seen, which are denied equally to the states of the American Union, either by express provision of the Constitution or by judicial interpretation and implication. As regards the matter of extradition of criminals, it may be remarked that whereas the corresponding provision of our constitution has been largely a dead letter, the Brazilian law covering the subject[1] has given this provision real effect. All of these express prohibitions on the states were contained in the constitutional drafts of the provisional government in almost the identical form in which they are contained in the constitution.

PARTICIPATION OF THE STATES IN THE ORGANIZATION OF THE FEDERAL GOVERNMENT.

The participation of the states as such in the organization of the central government is one of the features that influences the federal character of the system. In the formation of our own Union the equal representation of the states in the federal senate was one of the concessions that had to be made by the supporters of centralization to the representatives of the small states. That this principle is not, however, a necessary one in the constitution of federations was shown in the organization of the federal German empire, where there was not equal representation of the states in the federal council. But the principle of equal representation in the senate was embodied in the first provisional draft of the constitution of Brazil, made by the commission of five, and was accepted in all the subsequent drafts and by the constituent congress. The first draft went so far as to declare that the senate represents the states, each one being represented by three senators. In further imitation of the provisions of our own constitution in this regard, the Brazilian instrument provided that this equality of representation of the states in the senate may not be made the subject of constitutional amendment.[2] A proposal to eliminate this latter provision, already contained in the draft of the provisional government, was voted down by the constituent congress.[3]

[1] Law of January 30, 1892 (No. 39).
[2] Constitution of Brazil, art. 90, sec. 34.
[3] *Annaes do Congresso Constituinte*, Vol. II, pp. 370 and 417.

In the organization of the chamber of deputies, the Brazilian constitution, like our own, adopted the principle of representation according to population. But greater recognition is accorded to the states in Brazil in preventing undue disparity of representation than with us, for each state there is assured of at least four representatives irrespective of population instead of only one, as with us. Under the empire there were seven provinces that sent only the minimum number of two deputies established by law of August 18, 1860, some of them sending only one before that time. By decree of June 23, 1890 (No. 511), the provisional government assigned to three of the states the minimum number of two deputies for the constituent congress, but did not specify a minimum number of representatives either in the original draft of June 22 or in the revised draft of October 23 of the same year. The requirement of a minimum of four representatives in the chamber of deputies for each state was inserted as an amendment by the constituent congress. Under the apportionment law of 1892 the representation of those states having less than the minimum number of four deputies was increased to that number, the quotas at the present time varying from 4 to 37. In spite of this modification of the principle of representation in the lower chamber on the basis of population, there is to-day, as there was in the constituent convention, a current of opinion in favor of putting all the states on a basis of equality as regards such representation. The spokesmen of the smaller states complain that the votes of the five largest states constitute together a majority of the chamber of deputies and that the smaller states are hopelessly outvoted.[1]

If in the organization of the national congress the states as such are accorded somewhat more importance in Brazil than with us, the

[1] The representation of the various states under the present apportionment is as follows, the population of the states according to the federal census of 1920 being given to show the inequalities that exist in the relation between population and representation in the chamber of deputies:

State.	No. of deputies.	Population in 1920.	State.	No. of deputies.	Population in 1920.
Alagoas	6	978,748	Parahyba	5	961,106
Amazonas	4	363,166	Paraná	4	685,711
Bahia	22	3,334,465	Pernambuco	17	2,154,835
Ceará	10	1,319,228	Piauhy	4	609,003
Districto Federal	10	1,157,873	Rio de Janeiro	17	1,559,371
Espirito Santo	4	457,328	Rio Grande do Norte	4	537,135
Goyaz	4	511,919	Rio Grande do Sul	16	2,182,713
Maranhão	7	874,337	Santa Catharina	4	668,743
Matto Grosso	4	246,612	São Paulo	22	4,592,188
Minas Geraes	37	5,888,174	Sergipe	4	477,064
Pará	7	983,507			

reverse is true with regard to the election of president. In the United States the states are recognized units for the choice of presidential electors, with a considerable measure of freedom as to the manner of choosing them, the votes of the states being cast as a rule *en bloc*. In Brazil, on the other hand, where the president is elected by direct popular vote, the states are merely election and canvassing districts, the votes obtained by each candidate in each state being added to the votes cast for him in the other states.

THE RÔLE OF THE STATES IN THE AMENDING PROCESS.

If the real test of the federal character of a nation's political organization lies, as has sometimes been asserted, in the impossibility of altering the fundamental relation between the nation and its component states by action of the former alone, then the United States of Brazil do not constitute a federation. For by article 90 of the constitution the instrument may be amended by act of the congress itself, without any ratification by the states, such as is indispensable in the amending process with us.[1]

In theory, therefore, it would be constitutionally possible for the government of the Union acting alone to reduce the powers of the states almost to the vanishing point by the process of amending the constitution, whereas the states as such enjoy only the right to propose amendments by act of the legislatures of two-thirds of them within the period of a year, it being wholly within the power of the national congress to reject such proposals. In this latter case the states are without recourse, even should the legislatures of all of them agree unanimously upon a desired amendment.

In practice no such development has occurred, for up to the present no constitutional amendment of any kind has been adopted by the process described in this article of the constitution. But I have been unable to discover any explanation of the peculiar fact that with regard to this fundamental phase of the relation between states and nation in Brazil, the North American model, so influential in general, was not suggested in any of the three drafts considered by the commission of five, was not adopted by the draft of the provisional gov-

[1] ART. 90. The constitution may be amended upon initiative either of the national congress or of the state legislatures.

Sec. 1. An amendment shall be considered as proposed when, offered by at least one-fourth of the members of either chamber of the national congress, it shall have been accepted in three readings by a two-thirds vote in each chamber, or when requested by two-thirds of the states within the period of a year, each state acting through majority vote of its legislature.

Sec. 2. Such proposal shall be considered as adopted if it be passed in the following year in three readings by a two-thirds majority in the two chambers of the congress.

Sec. 3. The approved amendment shall be published with the signatures of the presidents and secretaries of the two chambers and shall become incorporated in the constitution as an integral part thereof.

Sec. 4. Proposals looking to the abolition of the federal republican form or of the equality of representation of the states in the senate may not be admitted as matters for deliberation.

ernment, and was not proposed either by the committee of 21 of the constituent congress or from the floor of the convention itself. Such criticism as is directed to-day against the amending process demands not safeguards for the states as units in the federation, but, on the contrary, a greater facility of action.

SUMMARY.

Comparing the constitutional distribution of governmental powers between states and nation in Brazil with the situation in the United States of America, one may say that no categorical answer can be given to the natural question as to which country has the most centralized system. The general theory of such distribution as expressed in the constitutions of the two nations is virtually the same, viz., a federal government of specified powers and state governments of general powers. In the detailed specification of the powers in the constitution, the Brazilian national government is accorded important powers which the national government of the United States lacks, or at least did not expressly receive, such as the broad power of intervention in the affairs of the states; the power of general legislation in matters of criminal, civil, and commercial law; the power to declare a partial or general state of siege; the power to determine the state boundaries; the power to establish institutions of secondary and higher learning; the power to own and operate telegraphs, railroads, and other means of transportation, etc. On the other hand, the federal government in Brazil is limited in certain respects in which the government of the United States enjoys larger powers, as, for instance, in the taxing power, in the possession of public lands, in the constitutional grounds for declaring war, etc. Similarly, the constituent states in the Brazilian federation enjoy powers that are in some respects more extensive than those possessed by the states of our Union and in others less so. In the matter of finances, for example, the Brazilian states possess the power to levy export taxes and the exclusive power to derive revenues from real-property taxes and from taxes on industries and professions, whereas in the fundamental matter of amending the federal constitution the states as such have in Brazil no necessary part. What stands out clearly, however, from even this brief summary, is that in this basic matter of the constitutional distribution of powers between states and nation Brazil has by no means resorted to a mere paraphrasing, as is frequently asserted, of the provisions of our own constitution. Brazilian jurists and constitutional lawyers are not in agreement as to the wisdom of these departures, some believing that it would have been better to adhere in all respects to the North American model, while others believe that many of the ills of the Brazilian governmental system to-day flow from the ill-considered adoption of an alien and unsuited

model; but here we are not concerned with a consideration of such opinions. It is sufficient at this place to emphasize that though the general similarity between the two constitutional systems of Brazil and the United States is obvious, the differences are neither few nor unimportant.

If a study of the mere formal constitutional concepts of the two systems affords no clear answer to the question in which of the two countries the individual states are relatively more important, an examination of the actual workings of the system introduces still more conflicting factors, some of which have been briefly indicated already and others of which will be considered further on. The estimate of this phase of the question must be postponed till later.

POSITION OF THE FEDERAL DISTRICT IN BRAZIL.

Before leaving this question of the federal basis of the Brazilian system, it seems advisable to say a word regarding the position of the federal district in that system, as that position is so strikingly different from the one occupied by the District of Columbia in the United States.

Even in colonial times the municipality of Rio de Janeiro, in common with other important municipalities, enjoyed a considerable measure of autonomy. Organized anew by the law of October 1, 1828, in execution of article 169 of the constitution of the empire, the municipality lost much of its autonomy, which it did not recover when by the *Acto Addicional* of 1834 it was constituted a neutral municipality separated from the province of Rio de Janeiro and directly subordinated to the imperial authorities. When the empire was overthrown, the municipal council of Rio de Janeiro was dissolved and a provisional governing board appointed on December 7, 1889, by the revolutionary government in a decree which recognized the obligation to accord to it a proper autonomy.[1]

The draft constitution of the commission of 5 fulfilled this recognized obligation by stipulating that everything provided in the constitution with regard to the states should apply to the federal district, as the former neutral municipality was to be designated, within the limitations established by the constitution, declaring at the same time that the government of the district should be organized by the national congress. Less pronounced as regards the constitutional position of the federal district but in about the same sense, the draft constitution contained in the decree of June 22, 1890, of the provisional government, provided that the federal district should be administered by municipal authorities, subject to the restrictions specified in the federal constitution and laws. But by the time the

[1] Decree No. 50A of the provisional government.

revised draft was decreed by the provisional government on October 23 of the same year the centralizing tendencies which had begun to control the acts of the provisional government manifested themselves at this point also. The text of the former provision was altered to read that the federal district should be governed directly by federal authorities, saving specific restrictions in the constitution and the rights of the respective municipality. The committee of 21 of the constituent congress, however, changed the wording of the provision to conform to that of the first decree, and so it stands to-day.[1]

This provision of the constitution was intended to establish the general principle of local autonomy for the federal district, subject to the express restrictions of the constitution and the laws. These restrictions are found in the power granted to the national congress to legislate on the municipal organization of the federal district, as well as with reference to police, higher education, and the other services in the capital that might be reserved to the government of the Union.[2] In the exercise of this power, however, the congress has provided for a prefect, appointed by the president of the republic, who is executive head of the district with power of veto over the ordinances of the municipal council. The jurisdiction of the latter has, moreover, been restricted in various other ways, contrary, it has been asserted, to the tenor of this article.[3]

But however much the local autonomy of the federal district may have been circumscribed by congressional legislation, as regards its share in the organization of the national government the federal district stands on a plane of perfect equality with the states of the Union, being represented by three senators equally with them and by the number of deputies (10) that corresponds to its population. Whereas the inhabitants of the District of Columbia are wholly disfranchised not merely for local but also in national elections, the residents of the Brazilian federal district participate in both. Indeed, the constitution of Brazil has in mind the removal of the federal capital to a district in the central state of Goyaz and provides that upon such removal the present federal district of Rio de Janeiro shall become a state of the Union.[4]

[1] Constitution of Brazil, art. 67: "Saving the specific restrictions of the federal constitution and laws, the federal district is administered by the municipal authorities. The expenses of a local character in the capital of the republic are chargeable exclusively to the municipal government."

[2] Constitution of Brazil, art. 34, sec. 30.

[3] For this view, see Araujo Castro, *Manual da Constituição Brasileira*, 2d ed., Ch. X. For a more conservative interpretation of this provision regarding the autonomy of the federal district, see Barbalho, *op. cit.*, p. 277.

[4] Constitution of Brazil, art. 3.

CHAPTER III.

THE FEDERAL CONGRESS.

The constitution of Brazil, before proceeding with the detailed organization of the federal government, accords express recognition to the doctrine of the separation of governmental powers in the declaration that the organs of national sovereignty are the legislative, executive, and judicial powers, harmonious with and independent of each other.[1] This declaration is still further strengthened towards the end of the instrument by a provision which forbids the citizen invested with functions of any one of the three powers to exercise those of either of the others.[2]

This principle of the separation of powers was not new, however, in the constitutional law of Brazil, for the constitution of the empire of 1824 had consecrated it,[3] though that instrument added a fourth power, the so-called moderative power, which was in reality superior to the other three and was lodged in the hands of the emperor. There was, therefore, unanimity of opinion with regard to the inclusion of this distributive article in the federal constitution of Brazil, even though it was not contained in the constitution of the United States.

No less general was the agreement with regard to the adoption of the bicameral principle in the organization of the legislature. Not only was this principle already applied in the constitution of the national legislature under the imperial constitution, but its desirability in a federal organization was recognized even by some members of the constituent convention who were opposed in general to the bicameral scheme of legislative organization.[4] The designation of the two branches as chamber of deputies and senate, respectively, was also continued from the earlier constitution, though the American term congress was substituted for the former designation of general assembly. The prohibition against simultaneous membership in the two chambers was also continued from the imperial constitution.

In the method of constituting the two chambers, however, radical departures were made from the former system. For the senate, consisting of life members selected by the emperor from a triple list submitted by the provinces, more or less in proportion to population, there was substituted a body chosen by direct election for nine years, three for each state and the federal district, renewed by thirds every three years. In place of the chamber of deputies, chosen, as it was until 1881, by a system of indirect election, the new constitution established the principle of direct election and minority representa-

[1] Constitution of Brazil, art. 15.
[2] *Ibid.*, art. 79.
[3] Constitution of the Empire of Brazil, art. 9.
[4] Barbalho, *op. cit.*, pp. 54 and 55.

tion. In place of suffrage limitations that required not only the attainment of 25 years of age but income requirements, the new instrument, adopting the basis decreed on November 19, 1889, by the provisional government, extended the right to vote to all Brazilian citizens who could read and write, with the exception of beggars, common soldiers, and members of religious orders, exceptions already established under the imperial constitution. In other important respects also the republican *régime* modified the status of the legislative chambers, their relations to each other and to the executive branch of the government, matters that will be touched upon again hereafter.

THE ELECTORATE.

In Brazil the members of the lower house of congress, as well as federal senators, and also the president and vice-president of the Union are chosen by direct election. Moreover, in further contrast to our own electoral system in the United States, the qualifications for suffrage for these offices are definitely fixed in the constitution, and the congress is given express power to regulate the conditions and the electoral process under which such elections are held. Finally, it is to be observed that the qualifications and disqualifications established by the federal constitution for voting govern also the electorate for state and municipal elections, leaving only the regulation of the electoral process in state and municipal elections to the individual states, there being even some doubt as to the constitutional existence of that power in the states.[1]

Article 70 of the constitution of Brazil stipulates that all citizens of more than 21 years of age who are registered in conformity with the law are electors. It then goes on to enumerate the classes of persons who may not be so registered: mendicants, illiterates, common soldiers, and members of monastic orders, congregations, or communities, of any denomination subject to a vow of obedience, rule, or statute which involves the renunciation of individual liberty. To these classes, the exclusion of which was approved in the draft constitution of the commission of five, in the almost identical phraseology of the draft of the provisional government, in the report of the committee of 21 of the constitutional congress, and in the final form of the constitution as adopted by the congress, must be added women, though the term "citizen" might be regarded as including them also, in the absence of express disqualification. Various amendments were offered in favor of woman suffrage on the floor of the constituent congress, but they were all rejected by that body, leaving, it would seem, no doubt that it would require an amendment to the federal

[1] See Castro Nunes, *As Constituições Estaduaes do Brasil*, pp. 46–49.

constitution of Brazil to permit women to vote in either national or state elections.[1]

In execution of the powers conferred upon the congress to regulate the conditions and process of federal elections, a number of laws and supplementary executive decrees have been adopted, beginning with the law of January 26, 1892, and including the law of December 27, 1916, as modified by the laws of December 20 and 30, 1920, and supplementary decrees.

The most striking fact that appears in connection with the federal electorate is that with a population of more than 30,000,000 the number of voters registered at the time of the last presidential election (March 1, 1922) was 1,305,826. Under a system of universal male suffrage the electorate would normally be estimated at about one-fifth of the total population, or, say, 6,000,000 in Brazil. Accepting the current figures as to illiteracy in Brazil at 80 per cent and assuming that this percentage holds good, more or less, for the adult male population in the same ratio as for the population as a whole—an assumption which can neither be proved nor disproved—the literacy test would more than account for the limited number of registered voters, not taking into consideration the other classes excluded, which indeed are negligible for all practical purposes. In view of these facts it is difficult to credit the assertion commonly made that the difficulties connected with the process of registration keep a considerable number of eligible electors from voting. That the registration process is elaborate when compared with the rather simple methods followed in most of our states cannot be denied, nor, on the other hand, can it be denied that it offers greater safeguards against voting by persons not qualified to do so under the laws.

A citizen qualified to vote makes application for registration to the state judge of the municipality in which he resides, in a signed petition, sworn to before a notary, giving his age, birth-place, parentage, civil status, profession, and place of residence. This must be accompanied by duly authenticated documents proving legal age, means of subsistence, four months of uninterrupted residence in the municipality, possession of Brazilian citizenship, photographs, and fingerprints. These documents are handed in to the clerk of the competent judge, and within a specified time the prospective elector must present himself and inscribe his name in the official register, provided his petition and documents have been found to be in good order. Within eight days, if everything is satisfactory, the elector's name is inscribed in the proper record book and published and a voter's card issued to him as a means of identification. Elaborate safeguards are stipulated in the law not only against improper inclusion in the list

[1] For the opposite view, see Araujo Castro, *op. cit.*, p. 304.

of registered voters, but also against improper exclusion of those entitled to be so registered.

Once the voter is duly registered, no further formalities are required of him, and he can be taken off the registration-list only in case of petition by him for transfer of registration, or upon motion of the government or of any citizen proving death or disqualification by judicial sentence involving loss of political rights. Under this system it is not at all impossible that a person's name may remain among the list of registered voters for an indefinite time after the death or departure of that person, thus facilitating fraudulent impersonation at the polls. This, in fact, is one of the charges most freely made in connection with alleged election frauds in Brazil.

The voting process itself is minutely defined in laws and regulations intending to safeguard the secrecy and freedom of elections. The state judges of first instance play an important rôle not only in the registration process but also in the electoral procedure. They designate the polling places, preferably public buildings, forty days before the election, which are to serve as such for the period of the legislature; they preside over the election-board at the seat of their court; they certify the composition of the election-boards in the precincts in which the law says these shall consist of three voters nominated by the qualified voters of the precinct; they divide their district into the number of sections or precincts required by law, designate the voters of each precinct, and send to the president of each election-board a certified list of the voters as inscribed in the permanent registration-books, and they distribute the election paraphernalia, furnished them by the federal judge in each state, to the different election-boards.

On the day of the election any candidate or any group of fifty electors may be represented in the polling-place by a watcher officially designated. The president of the election-board must show to the voters the open ballot-box to demonstrate that it is empty, and then lock it, keeping one key himself and entrusting the other to the secretary of the election-board. The secretary must then enter in the official record-book the fact of the opening of the election process, and each voter must sign the same before dropping his ballot in the box. Each voter must present his electoral card, duly authenticated, and his police identification-card in those areas where the latter is officially required. A member of the election-board calls the roll of the voters in the order of the names on the official list, and these when duly identified cast their ballots. The vote must be secret, written or printed on a ballot inclosed in a sealed envelope without any distinguishing-mark except to indicate the office for which the election is being held. There being no official ballot, therefore, the same difficulty of insuring the secrecy of the vote in fact is encountered in Brazil as in other countries not employing the Australian

system, and in consequence, also, the same facilities for the use of bribery and intimidation are afforded that are encountered elsewhere as a result of this situation. Without being in a position to determine by personal investigation the extent to which bribery and intimidation are in fact resorted to in Brazilian elections, it may be safe to assume from the oft-repeated statements of dispassionate and authoritative citizens of Brazil that these represent a serious evil, an evil which it seems might be lessened in Brazil, as it was in the United States, by the introduction of the truly secret ballot.

The polling-places are kept open until 3 o'clock in the afternoon if there are any voters listed who have not answered the roll-call or presented themselves for voting after such call. Then the ballot-box is opened in the presence of the voters, the ballots taken out and collected in packets of fifty and the total number of ballots compared with the number of voters who appeared. The president of the election-board then reads aloud the names of the candidates appearing on each ballot, the same being noted down by the other members of the board, who together with the watchers must verify the correspondence of the ballot with the names read by the president. Invalid votes, votes of doubtful significance, or votes of questionable electors are counted separately, and at the end of the count the results are given in written form to the candidates or their watchers and are published in the press and by posting at the polling-place. The minutes of the entire election process are prepared immediately by the secretary and signed by the members of the board and the watchers, with such protests as may have been made, together with their justification. Copies of the results are sent to the chamber of deputies and to the senate, and the official records and books of the election dispatched to the canvassing-board.

The canvassing-board for each state consists of the federal judge in that state as president, his substitute, and a representative of the ministry of justice of the state. The function of the canvassing-board is to examine the official election documents to see whether they have been prepared and authenticated in the manner prescribed by law. The sessions of the canvassing-board are public, and the candidates are specifically authorized to be represented by attorneys or watchers. The results arrived at by the canvassing-board are published and sent to the secretaries of the chamber of deputies and the senate, respectively, and certified copies given as credentials to the candidates who received the highest votes for senator or deputy.

The penal code and also special penal provisions in the election law itself provide severe penalties for violating any of the provisions of the latter. So far as statutory provisions can safeguard the purity of elections, everything needful seems to have been done in Brazil. Whatever truth there may be in the frequent charges made of whole-

sale corruption in the elections, charges which, as elsewhere, are loudly proclaimed by the unsuccessful candidates and emphatically denied by the successful ones and the officials in charge of the elections, can not be laid to insufficient legislation. The charges are made more frequently with regard to elections for state officers than with regard to elections to fill federal positions, but it is to be noted that the state regulations in general follow, if they do not repeat *verbatim*, the provisions of the federal law. That it is possible for frauds to be perpetrated when the executive, legislative, and judicial branches of a state or local government are dominated by the same corrupt forces, no matter how elaborate may be the laws safeguarding the elections, has been shown on more than one occasion by elections in the United States. The readiness with which the defeated political forces in Brazil raise the cry of intimidation, bribery, and all manner of official duress and corruption leads one to suspect that there is something more than the mere rancor of defeat behind them. The familiar saying that one never searches for others except in corners where one has himself been in hiding would seem to point to a rather unfortunate prevalence of such practices in Brazil, a charge which a foreigner wholly unable to investigate in person hesitates to make even upon the supporting testimony of numerous well-informed natives.

THE CHAMBER OF DEPUTIES.

The chamber of deputies consists of members elected for three years by the electorate and the electoral process above described, with a provision for minority representation. The number of deputies is determined by law, on a basis of not more than 1 for every 70,000 inhabitants, each state, as well as the federal district, being entitled to at least 4 deputies, irrespective of population. For this purpose the constitution of 1891 prescribed the immediate taking of a federal census to be revised every ten years.

Under the imperial law of October 20, 1875, the chamber had consisted of 122 members, with a minimum of 2 for each province, the municipality of Rio having at that time no representation. By the decree of June 23, 1890, the provisional government of the republic increased this number to 205, giving the newly constituted federal district 10 deputies, but retaining the minimum number of 2 deputies for three of the states and 3 for another. By law of January 26, 1892, the representation of these states was increased to the minimum of 4 each, thus increasing the membership of the chamber to 212, a figure at which it has remained to the present day.

According to the census relating to the year 1890, Brazil contained something over 14,000,000 people, so that the ratio of 1 deputy to every 70,000 was closely approximated. The next census, in 1900, gave over 17,000,000, but the number of deputies remained the same. No

further census was taken until 1920, which showed a population of 30,635,605, so that the basis of representation to-day is about 1 deputy for every 144,000 inhabitants. Proposals have already been introduced to increase the membership of the chamber to correspond to the new census. Though it is doubtful whether increasing the total membership would be advantageous, a reapportionment is necessary in order to insure that representation according to population by states which the constitution contemplates. But as this would involve a reduction in the present representation of some of the states, the same tendency is apparent that has appeared after each decennial census in the United States, to increase the total membership of the lower house.

The elections for deputies are held, simultaneously with those for the partial renewal of the senate, on the first Sunday in February of the year in which the preceding legislature expires, except when these fall in the same year with the elections for president and vice-president (which occurred in 1918 and will occur every twelve years thereafter), when they are held at the same time with the latter, on March 1.[1]

Article 28 of the constitution prescribes that in the election of deputies minority representation shall be guaranteed, leaving it to the discretion of the congress in what manner this is to be accomplished. This idea was incorporated into the constitution by virtue of an amendment introduced in the constituent congress and approved on February 17, 1891. In the form in which it was presented and adopted it guaranteed the representation of *minorities,* not merely of *the minority,* as it read when revised by the committee on form and finally voted by the congress. The intent of this amendment, according to the opinion of Barbalho, a member of the congress, as well as of other members of the same, was to provide for proportional representation, a scheme already then employed in various legislative bodies of the world and advocated by prominent Brazilians since the middle of the nineteenth century. It had even received some halting and imperfect recognition in the electoral laws of the empire. It was only by an error in revision that the constitution, in speaking of representation of the minority, did not specifically indicate proportional representation as the system for electing deputies, though it should be noted that an amendment specifying in express terms the system of proportional representation of majorities and minorities had been defeated earlier in the congress.[2]

Whatever may have been the intent of the constitution, the congress in enacting the first election law (January 26, 1892) did not

[1] Decree No. 3,424, of December 19, 1917.
[2] *Annaes do Congresso Constituinte,* Vol. I, pp. 336, 385.

adopt a system of proportional representation, but a system of minority representation on the principle of the limited vote. Since that time various proposals have been made and introduced for the substitution of proportional representation in the election of deputies, but so far without success. The present election law (law No. 3,208, of December 27, 1916, with amendments and supplementary regulations in 1917, 1920, and 1921) applies the twofold principle of the limited vote and the cumulative vote. The states which elect more than 7 deputies are divided into districts electing 5 each. Those electing from 4 to 7 deputies constitute a single district. Each elector votes for a number of names one less than the number to be chosen from his election district, and he may, moreover, concentrate all his votes or part of them on a single candidate by writing his name as many times as he may wish to vote for that particular candidate. If he writes only one name, only one vote is counted. If he writes more names or the same name more times than the number of votes he is entitled to, the votes are counted in the order written, up to the legitimate number.

Barbalho denounces the system of voting established by the electoral law of Brazil as inefficacious, not to say hypocritical, but Barbalho was a pronounced advocate of proportional representation. With more justice, it would seem, Castro observes that no system of voting can in itself guarantee the representation of minorities, a desideratum attainable only by a sound political education, which in the opinion of this observer is still a long way from being realized in Brazil.[1] What competent observer of political conditions in the United States would not agree that the same remark may with justice be applied to our situation here?

The constitution prescribes both qualifications and disqualifications for the office of federal deputy. As positive conditions of eligibility it requires the enjoyment of the rights of a Brazilian citizen, the possession of Brazilian citizenship for more than four years, and eligibility for being inscribed in the voters' list, that is, the possession of the qualifications of an elector.[2] These stipulations exclude, therefore, the eligibility of women to the chamber of deputies. In conformity with the accepted constitutional doctrine in the United States, it would seem that the congress would have no power to extend or contract these constitutional prerequisites, and such is the opinion of Castro in his Manual da *Constituição Brasileira.*[3] Nevertheless, in the first electoral law, of January 26, 1892, the congress established the following list of persons and classes of persons who were ineligible for election to the congress, and these disqualifications have been retained in all subsequent legislation regarding the matter.

[1] Araujo Castro, *op. cit.*, p. 81. [2] Constitution of Brazil, art. 26. [3] Pages 71–75.

Law No. 3208, of December 27, 1916, articles 35 to 37.

ART. 35. Ineligibility involves the nullity of the votes cast for the citizens in question, with the result of considering as elected the next in order of votes, saving the provisions of the following article:

ART. 36. The candidate next highest in order of votes to the one ineligible can be recognized as elected only if he obtain more than half as many votes as those cast for the one ineligible; otherwise a new election must be held, in which the ineligibility will apply.

In calculating the above ratio of votes only the valid ones shall be counted.

ART. 37. The following are ineligible for election to the national congress:

I. Throughout the whole republic:
- (*a*) The president and vice-president of the republic, and the governors or presidents, as also the vice-governors or vice-presidents of the states;
- (*b*) The ministers of state, the directors of the respective secretariats as well as those of the national treasury;
- (*c*) The judges, directors, and representatives of the administration in the court of accounts;
- (*d*) The heads and sub-heads of the general staffs of the army and navy;
- (*e*) Federal judges and judicial officers;
- (*f*) Federal administrative officers who are removable without judicial sentence;
- (*g*) The presidents and directors of banks, corporations, societies, or undertakings that enjoy the following favors from the federal government:
  1. The guaranty of interest payments by subvention;
  2. The privilege of issuing negotiable notes with or without gold reserve;
  3. Exemption from or reduction in federal taxes or imposts by virtue of a law or a contract;
  4. Contracts regarding charges or grants of land;
  5. Monopoly rights regarding zones or navigation.

II. In the respective states and the federal district:
- (*a*) Relatives by blood or marriage in the first or second degrees of state governors or presidents, even though these are not in the exercise of their offices at the time of the election, and for 6 months before the same, unless the candidates have held the legislative office in the legislature preceding the election of the governors in question, or were the incumbents of such office at the time;
- (*b*) The relatives by blood or marriage in the same degree of vice-governors or vice-presidents of the states, who have held office in the 6 months prior to the election, saving the exception mentioned in the preceding paragraph;
- (*c*) State judges or judicial officers;
- (*d*) The permanent chiefs of military inspection;
- (*e*) Officers exercising any command of military or naval forces, police, or militia, not including the officers of the national guard;
- (*f*) The administrative officers of the states who are removable without judicial sentence.

III. In any state and in the federal district relatives by blood or marriage in the first or second degree of the president or vice-president of the republic, until 6 months after the termination of the offices in question, saving the exception established in II, *a*.

IV. Within their respective circumscriptions the police authorities.

This anomalous modification of constitutional provisions by ordinary legislation—not unique as an example of that practice—seems to have been the result of confusing the concepts of ineligibility and incompatibility. In the draft constitution of the provisional government, decreed on June 22, 1890, seven classes of persons were declared ineligible for the national congress: the clergy, state governors, police chiefs, military and naval commanders, members of the judiciary, and administrative officials removable without judicial sentence. The committee of 21 of the constituent congress amended this article of the draft by substituting the present article 27 which leaves it to the congress to determine by special law the cases of electoral incompatibility, and it was in execution of this provision that the aforementioned law of January 26, 1892, enumerated the classes of persons who could not be candidates for election as deputies or senators.

But as Araujo Castro points out,[1] incompatibility and ineligibility are two different concepts. Ineligibility involves the nullity of the election, while incompatibility merely necessitates the choice on the part of the elected candidate between the two incompatible offices. The purpose of these restrictions was, of course, to prevent certain classes of persons from abusing their official positions in bringing pressure to bear in their own favor upon the electors. But the result of the election law of 1916 is to exclude, in effect, from standing for election to the congress all civil officers except those appointed for life, whose number is insignificant, while the officers of the army and navy, who have permanent posts, are not excluded. Here is a curious application of the Biblical principle that to him that hath shall be given.

Aside from these cases of ineligibility established by the constitution and the laws, there are cases of incompatibility established in the constitution as well. These are contained in articles 23 and 24, which prohibit members of either house of the congress from making contracts with the executive or receiving from him remunerative commissions or appointments, except diplomatic missions, military commissions or posts, or regular advancements or promotions,[2] as well as from being president or director of banks, corporations, or enterprises that enjoy favors granted under authority of law by the federal government. In any case of disregarding the provisions above cited, the legislator involved loses his seat in the congress. Moreover, by article 25 members of congress are prohibited from holding any other public office (literally, from exercising any other function) during the sessions of the congress. In the view of Barbalho, any member of the

[1] *Op. cit.*, pp. 73–75.

[2] For accepting either diplomatic or military appointments which conflict with the performance of his legislative functions, the member must obtain the consent of his respective chamber, unless in case of war or of circumstances in which the honor and safety of the Union are involved

congress who continues to exercise the duties of some other public office that interferes with his attendance at the sessions of the same should be considered as having vacated his seat, at least if he does so without the permission of his chamber.[1]

In the actual election of deputies, the most striking feature of Brazilian politics is the absence of parties. The only divisions existing for purposes of elections are the "situacionistas" and the "opposicionistas," or the "ins" and the "outs." The former are normally called the "partido republicano," while the latter may assume names of a purely temporary or local significance, such as the "reacção republicana," as in the last presidential election, "partido democratico," or "alliança," or "unitarios" in Rio Grande do Norte, or "federalistas" in Rio Grande do Sul. But these are almost all synonymous with "the outs" and have no defined political program other than to get in.

The real political power in each state is the governor or president, and it is his slate that is regularly successful in the elections for deputies. As a result of the limited and cumulative vote, a dozen or a score of energetic candidates succeed in winning seats in each congress independently of the support, and sometimes even in the face of the opposition, of the political leader of the state. But not infrequently even these unofficial candidates are personal friends of the governors, and so the representation in congress from each state ordinarily presents a harmonious picture of united action under a recognized "leader" of the delegation, the Brazilians having adopted this English term into their political phraseology.

Inasmuch as the state governors are normally supporters of the president of the Union, whom they select, their delegates in the congress are also with the administration, exhibiting a lack of opposition which is sometimes erroneously attributed to the inherent supremacy of the executive over the legislative branch, a characteristic of many Latin-American states. When the governor of the state is himself in opposition to the national administration, the outspoken hostility of the deputies from that state towards the president is decisive enough, as was amply illustrated in the recent situation in the state of Rio de Janeiro.

As far as the personnel of the chamber of deputies is concerned, chosen under this political system, the first fact to note is the restricted field of choice. The same social element furnishes the legislators and administrators in Brazil to-day as under the empire; the same family names even are perpetuated. There is a governing class in Brazil to-day just as truly as there was and is, though to a diminishing extent, in Great Britain. This is an aristocracy of wealth, tradition, and education combined, which constitutes the upper classes

[1] Barbalho, *op. cit.*, p. 75.

of Brazil. It is not a closed circle, for almost anyone with the requisite personal qualifications can aspire to enter it socially and politically. But the lack of a great middle class, moderately well off and moderately well educated, from which the upper classes would naturally be recruited, makes it in effect a matter of relatively rare occurrence that anyone without pride of ancestry and secure economic and social position breaks into the charmed circle.

In Brazil, as in Latin countries generally, the gentleman's profession par excellence is the law. The scion of a prominent family not burdened with the necessity of earning his daily bread turns as naturally to the study of the law as the elder sons of the upper English classes turned to sports, after completing a "liberal education" at Oxford or Cambridge. So it happens that the large majority of the deputies in the national congress of Brazil are bachelors of law, though they do not necessarily engage in the practice of the profession. Out of 22 deputies from the state of São Paulo in the last congress, 17 were law graduates, but only 3 or 4 of these ever actively engaged in that profession.

Next to graduates in law, but a long way behind, comes medicine in the number of representatives found in the chamber of deputies. Medicine, like the law, is studied by hundreds of young Brazilians as a hobby, with the sole purpose of acquiring the doctor's title that goes with it, but without any intention of making that the sole or even the chief activity of after life. A considerable number of the men prominent in Brazilian politics and letters are graduates of medical faculties but have never seriously practiced the medical profession.

A common complaint lodged against the Brazilian congress, as against the state legislatures, that are composed of much the same elements, is that it consists not of representatives so much as of professional politicians. It is clear, however, that a legislative body that sits for eight months each year in a country where it requires three weeks or more for the most distant members to make the trip between their districts and the national capital can not hope to have in its membership men who are actively and seriously engaged in some other undertaking and who serve only incidentally in the legislature. It is inevitable, therefore, that the members of the national congress should consist of men who make politics their principal if not their only occupation in life and who are in reality professional politicians. But the same stigma does not attach to the term as applied to Brazilian congressmen that attaches to it in this country when applied to our local politicians, for these are for the most part men who have not the qualities for succeeding in private pursuits and naturally occupy the field which in the United States is unfortunately eschewed by our "better classes." The Brazilian chamber of deputies is for

that reason superior to our house of representatives in the ability of the members that constitute it. This ability, however, is along the lines which are in Brazil rated most highly. Not "business" ability or profound economic insight are there accorded important places, but wide culture and the ability to write with effectiveness and to speak with power constitute the ability of which the cultivated Brazilian is proud. The congress, therefore, represents not the rank and file but the élite of the Brazilian nation, whereas our house of representatives, whatever may be its merits from the point of view of democracy and popular representation, would have great difficulty in securing recognition as the gathering-place of the élite.

By article 29 of the constitution certain special functions are accorded to the chamber of deputies. These include the initiative with regard to adjournment of the congress, with regard to all revenue laws and laws fixing the strength of the military and naval forces, and with regard to measures proposed by the executive. They include also the important power of impeaching the president and the ministers of state in the cases determined in the constitution.

Most of the special powers conferred in this article upon the lower house of the national congress were simply continued from the constitution of the empire and were embodied in much the same terms as those finally adopted by the constituent congress in all the earlier drafts. But the power to initiate the adjournment of the congress, inserted by amendment from the floor of the constituent congress, referred to a power which under the empire belonged not to the legislature at all but to the executive.

The power of initiative with regard to all tax laws resided in the chamber of deputies already in the time of the empire. Nothing is said expressly in the Brazilian constitution with regard to the power of the senate to amend such revenue measures, or other measures the initiation of which rests with the chamber. But under the empire and under the present constitution the senate has consistently exercised its power of amendment with regard to these measures, with much the same results as in the United States, viz., that the senate exercises at least an equal share in revenue measures, contrary to the clear intent of the constitution. Barbalho, indeed, contends that this right of amendment can properly be exercised by the senate only in the sense of diminishing the burdens imposed by the chamber; but other commentators question the soundness of this view, and certainly the practice of the senate has been consistently opposed to it. In this connection one must not lose sight of the different legislative procedure established in Brazil with regard to amendments. There amendments proposed by either chamber to the bills emanating from the other must, if not accepted by the latter, be repassed by a two-thirds vote. If so repassed, however, they remain part of the law

unless rejected by a similar two-thirds majority in the original chamber. This gives the chamber of origin a decided advantage not possessed by the like chamber with us, where differences between the houses are handled by means of conference committees, for not only must amendments receive a two-thirds majority in the second chamber if unacceptable to the first, but the last word rests with the chamber of origin.

Of particular interest also is the reference to bills submitted by the executive, with regard to the discussion of which the initiative is also accorded to the chamber of deputies by this article. Under the constitution of the empire, measures were regularly submitted by the executive and after consideration and report by the respective committees were explained and defended on the floor of the chamber by the proper ministers, developing, as has been explained, into the cabinet form of government. But the constitution of the federal republic, modeled consciously on the presidential form of government as exemplified in the United States of America, limited the participation of the executive in the legislative process to the directing of presidential messages, with recommendations for measures, to the congress and the exercise of the veto power, while the ministers were forbidden to appear in the sessions of the congress and were limited to communicating in writing with the same and to appearing in person before the committees, their annual reports to the president being distributed among all the members of the congress.[1]

The only authority for the direct submission of legislative proposals by the executive is contained in the indirect reference contained in this article. An amendment offered on the floor of the constituent congress to strike out this reference was defeated, a fact which Barbalho deplores on the ground that its inclusion is not in harmony with the general theory of the constitution as to the rôle of the executive in legislation.[2] It is rather curious, however, that he objected to it not merely on the ground that it unduly strengthened the share of the executive in the legislative process in violation of the principle of the separation of powers, but that contrariwise the power to submit measures without the power to defend them before the chambers might subject the ministers to reverses that would diminish their prestige.

The initiative in the impeachment process which is accorded by this article to the chamber of deputies will be touched upon at another place in the discussion of the responsibility of the executive branch of the national government. Suffice it here to say that this power already resided in the chamber of deputies, so far as ministers and councilors of state were concerned, under the imperial constitution.

[1] Constitution of Brazil, art. 51.

[2] Barbalho, *op. cit.*, pp. 89, 90.

THE SENATE.

Under the empire the senate consisted of life members chosen by the emperor from a triple list nominated by the process of indirect election in the provinces, each province being represented by a number of senators equal to one-half of the number of deputies chosen by that province, but in any event by at least one. The qualifications for senator included all the requirements for deputy plus a greater age requirement and a greater income requirement.

Under the republic these features of the composition of the senate were completely altered. For life membership there was substituted a term of 9 years, with one-third renewal every 3 years; for appointment by the executive, direct popular election; and for representation on the basis of population, equal representation in the number of 3 senators from every state as well as from the federal district. Eligibility for the senate was put on the same basis as eligibility for the chamber of deputies, except that for the former 35 years of age was required instead of 21 and Brazilian citizenship of 6 years instead of 4.

The draft of the commission of five contemplated direct election of the senators, but the draft constitution of the provisional government adopted the system of election by the state legislatures, embodied at that time in the constitution of the United States as well as in that of the Argentine Federation. The committee of 21 of the constituent congress, however, substituted direct election for this method and the change was adopted by the congress as a whole. The reason for this alteration as given by one of the members of the committee of 21, who characterized the scheme adopted in the United States in the early days of that republic as a folly, was that election of the senators by the state legislatures would in practice be election by the political chiefs. Other members of the congress combated this departure from the American model, also deplored by Barbalho, writing just a decade before the congress of the United States approved the amendment providing for direct election of United States senators.[1]

Other departures from the United States model in the composition of the senate were the provision for three senators instead of two, the nine-year term instead of six, and the representation of the federal district. It is not clear what motives influenced the commission of five to adopt three instead of two for the number of senators from each unit, but the nine-year term and the representation of the federal district were both features of the constitution of the neighboring federal republic, Argentina. This not only adds dignity to the office of senator but makes the body one of relatively great stability.

The conditions of ineligibility and incompatibility discussed above apply equally to the senate and to the chamber of deputies. As in the

[1] *Op. cit.*, pp. 92, 93.

United States of America, the equal representation of the states in the senate is accorded a special sanctity in the constitution, only in Brazil no amendment looking to the abolition of this equality may even be taken under advisement by the congress,[1] whereas in the United States this could be done with the unanimous consent of the states.

Like the chamber of deputies, the senate enjoys some special powers, chief among which in potential importance, though not in actual practice, is the power to try the president and other federal officers designated by the constitution when impeached by the chamber of deputies. Of more practical importance is the power of the senate to approve the nominations of the president to membership in the federal supreme court, to diplomatic posts, and to positions on the court of accounts.[2] This power of confirming nominations is much more limited, as is seen, than in the United States, for while the general rule established by our constitution[3] makes all presidential appointments subject to confirmation by the senate, in Brazil the general rule entrusts the appointing power to the president without such confirmation.[4]

In still another respect the position of the Senate is less favorable in Brazil than with us, for there the important power of ratifying treaties is not only shared equally by the lower house of the congress, but their consideration must be begun in that chamber under the provisions of article 29, considered above. As a consequence of this provision and of the fact that the congress may merely accept or reject but may not amend treaties submitted to it by the executive in the form of a law, the chamber of deputies by rejecting the proposed measure may exclude the participation of the senate entirely.[5]

The actual composition and position of the Brazilian senate show some very interesting features. Under the empire it carried on its roster at one time or another a large portion of the most able and prominent men in Brazilian public life. The majority of them were naturally supporters of the monarchical *régime* and were replaced in the elected senate of the republic by avowed supporters of the republican movement. To-day the senate is composed for the most part of men well advanced in years, and the roster of its membership comprises a number[6] of names that figured in the constituent congress of 1889. They are in a real sense, therefore, "the fathers," and are

[1] Constitution of Brazil, art. 90, sec. 4.
[2] *Ibid.*, art. 48, sec. 12, and art. 89.
[3] Constitution of the United States of America, art. 2, sec. 2, par 2.
[4] Constitution of Brazil, art. 48, sec. 5.
[5] Araujo Castro, *op. cit.*, pp. 100, 101. From these considerations the author referred to concludes that such measures should be considered by the congress in joint session of the two chambers.
[6] More than a dozen in 1922.

invested with the dignity and prestige that attach to that position. But the ranks of these patriarchs are being thinned every year, and a new generation of senators is taking their places, recruited for the most part from men who have attained prominence in the chamber of deputies or as state executives after the opening years of the republic.

The Brazilian senate has played no such rôle in the government of the republic as has the senate of the United States. For many years the action of the senate was directed by the energetic Pinheiro Machado, the prominent "gaucho" boss from Rio Grande do Sul, assassinated in 1915. Under his domination the senate was characteristically conservative and as such regularly supported the executive.

PROVISIONS AFFECTING BOTH CHAMBERS.

The time of meeting of the congress is fixed by the constitution for May 3 of each year[1] and the length of the session at four months. But the congress may by law change the date of convocation, and extend or adjourn the sessions by its own act. The former has not been done, the congress meeting on the day set, independently of any call, but as a general rule the sessions are extended each year to December 31, so that the regular period of the sessions is eight months instead of four months, as indicated by the constitution. In addition, special sessions may be called by the president, and even these have been necessary. Vacancies in either house are filled by new elections to be called immediately by the government of the respective states. It is to be noted that the characteristic Latin-American institution of alternate or substitute legislators was not adopted in Brazil, though the earlier election laws of the empire provided for substitute deputies.

The constitution prescribes that the two chambers shall function separately, but this applies only to their activities as a law-making body. In actual practice the two chambers meet jointly not only to canvass the votes for president and vice-president,[2] and to instal them in office,[3] but for the opening and closing of the congress, though this latter without adequate reason, in the opinion of Barbalho.[4] Under the empire not only the opening and closing sessions of the general assembly, as well as those for administering the oath to the emperor, were joint sessions, but provision was also made for joint sessions in the legislative process in case of disagreement between the chambers. But this latter was a feature of the old *régime* which all the constitutional projects under the republic rejected, substituting therefor the peculiar provisions to be considered later.

[1] The traditional, though not historically accurate, date of the discovery of Brazil, which occurred on April 22. See Fleiuss e Magalhães, *Quadros de Historia Patria* (Rio de Janeiro, 1919), p. 7. [2] Constitution of Brazil, art. 47. [3] *Ibid.*, art. 44. [4] *Op. cit.*, p. 63.

The constitution also prescribes public sessions, but leaves the chambers free to hold secret sessions by decision of a majority of the votes.[1] A majority of the members is stipulated as a quorum, a majority of the quorum being necessary and sufficient for valid action, unless otherwise stipulated in the constitution. Otherwise the procedure in the chambers is left to the determination of the chambers themselves, along with the power to verify and accept the credentials of their members, to elect their executive board, to preserve order within their precincts, and to appoint the clerical employees.[2]

These are all powers of fundamental importance not only for the avowed purpose of insuring the independence of the chambers, but also in their political bearing. The power to pass upon the validity of the election of its members involves, of course, the power of abuse and of subverting the real results of the electoral process, a danger which did not escape the notice of the framers of the constitution. But in view of the greater objections to leaving this matter in the hands either of the executive or the judicial power, the practice of other nations was followed in this regard. The process for passing upon the credentials of those elected to the senate and the chamber of deputies is regulated by the respective rules of procedure, which also determine the composition and method of election of the executive board (*mesa*), the preservation of order, and the constitution of the clerical force. In relation to this last, it is to be noted that although the constitution assigns to each chamber the power merely to appoint the employees of the secretarial force, assigning by another provision the power to create public employments, fix the duties, and determine the salaries to the congress as a whole in the regular process of legislation, in actual practice the two chambers have individually created these posts and fixed the salaries.

The executive board of each chamber consists of a president and four secretaries elected for a year at the beginning of each ordinary session, except that the vice-president of the republic is by constitutional provision the president of the senate. The senate has a vice-president and the chamber of deputies two vice-presidents, besides substitute secretaries. Each house makes provision for the organization of committees, permanent, special, mixed, and general. The permanent committees are elected by the respective chambers, in the Senate annually, in the chamber of deputies for the duration of the legislature (three years). The senate has eleven permanent com-

[1] Barbalho lists four cases in which secret sessions are not permissible, the first by express contrary stipulation of the constitution, the other three by reason of the nature of the acts undertaken. These are (a) the assumption of office by the newly elected legislators; (b) the examination of the credentials of the same; (c) the canvassing of the votes for president and vice-president; and (d) the impeachment process. *Op. cit.*, p. 61.

[2] Constitution of Brazil, art. 18.

mittees, the chamber of deputies twelve. The function of these committees in the legislative process will be considered later on.

In the matter of parliamentary immunities the constitution of Brazil goes further than that of either the United States or the Argentine, for in the first-named the inviolability of senators and deputies for their opinions, words, and votes in the exercise of their mandate is absolute, whereas, in the last two named each house is expressly given the right to punish members for disorderly behavior even to the extent of expulsion. This absolute inviolability is one that is even beyond the power of the legislator himself to waive,[1] though it has been denounced as out of place in a republican *régime*.[2]

With regard to freedom from arrest, the protection which the Brazilian constitution throws around the members of the congress is also greater than that established by our constitution. For only in case of being apprehended *in flagrante* in a crime for which bail may not be given may members of the national congress be arrested or proceeded against by criminal process without permission of their respective chambers, this immunity extending from the time the candidates receive their certificates of election until the next election is held.[3] Moreover, the supreme court has held that in case the chamber refuses permission, this disposes of the case for all time, with the result that no action can be taken even after the termination of the mandate.[4]

On taking their seats the members of the two chambers must make a formal promise, in public session, faithfully to fulfil their duties. They receive, during the sessions, a per diem and expense allowance, equal for all and fixed by each legislature for the succeeding one.[5] Once duly seated, the member of Congress can lose his seat only as a result of death, resignation, or the acceptance of an office or employment incompatible with the legislative mandate as discussed above. The constitution simply directs the executive of the state in whose representation a vacancy has occurred to proceed immediately with the calling of an election to fill the same. The election law of January 19, 1921, however, stipulates that if a date is not fixed within thirty days of the occurrence of vacancy by death or resignation, the executive board of the respective chamber, or, during legislative recess, the respective president, shall fix a date within a maximum period of three months from the date of vacancy.[6] The same law

[1] Manual do Senador (Rio de Janeiro, *Imprensa Nacional*, 1920).
[2] Barbalho, *op. cit.*, p. 64, and Castro, *op. cit.*, p. 77.
[3] Constitution of Brazil, art. 20.
[4] Decision No. 299, of September 25, 1915, cited in Araujo Castro, *op. cit.*, p. 77, n. 5.
[5] The sums so allowed each member of the congress are a per diem of 100 milreis (about $25 at normal exchange rates) and 1,000 milreis expense allowance.
[6] Article 68 of the election law of 1921 (decree No. 14,631).

fixes the date at which a vacancy occurs as a result of accepting an incompatible office.[1]

POWERS OF THE CONGRESS.

In a preceding chapter an examination was made of the powers of the federal congress from the point of view of federal powers in relation to the sphere of action of the states. These powers will now be examined from the point of view of the congress as one of the organs of the national government. Attention has already been called to the fact that article 34, in which are enumerated the bulk of the powers of congress, commences with the statement that the powers therein enumerated belong exclusively (*privativamente*) to that body, and that that exclusiveness was believed by Barbalho to mean over against the state governments rather than as opposed to the other organs of the national government. Nevertheless, as has been pointed out, the wording of this article defines the position of the legislature over against the executive and judicial branches as well, taken in connection with the other provisions of the constitution that define the jurisdiction of the other two organs of government, which in the language of article 15 are, along with the congress, "harmonious and independent with relation to each other."

First among the powers of the congress enumerated in this article is that of estimating the income and fixing the expenditures for each year, as well as of examining the accounts of receipts and expenditures for each financial period. Taken together with other provisions of this same article and with section 30 of article 72, which declares that no tax of any nature may be collected except in virtue of a law authorizing the same, this provision makes the legislative body completely responsible for every phase of the national finances. The authority to contract loans or enter into other credit operations, the manner of administering the public debt and providing for its payment, the regulation of the collection and distribution of federal revenues, the control of the monetary system of the country, and the creation of banks of emission are all matters that fall within the legislative jurisdiction of the congress.

The budget procedure in Brazil is regulated by law in accordance with the provisions of the constitution. Prepared by the minister of finance on the basis of estimates submitted by the other secretaries of state, the proposed budget is submitted to the national congress in a presidential message a few days after the opening of each annual session. It really consists of two parts, estimated expenditures and estimated receipts, and is in the form of a bill which in accordance with article 29 is considered first by the chamber of deputies and from there sent to the senate. The chamber of deputies and also

[1] Art. 69 of the election law of 1921 (decree No. 14,631).

the senate, as has been seen, are free to alter the proposal as submitted by the president, by increasing or diminishing the estimates either as to expenses or as to revenues, a power which the two chambers have freely used, especially as regards increases in estimated expenditures. Not only, however, may the budget law contain provisions with regard to finances, imposing new taxes or altering those already in existence, but it may and usually does contain provisions of a permanent nature not financial in their nature. Such measures, known in the United States as "riders" and in Brazil as "tails," are employed for the same reasons there as here and are open to the same or even greater objections. Owing to the absence of authority on the part of the president to employ the partial veto, the appropriation law enables every member of the congress to get his measures of a private or even public nature attached to this necessary piece of legislation. Consequently, although the responsibility for recommending appropriation and revenue measures rests with the executive, the measure as finally passed may not accord at all with those recommendations and may even be in many respects quite contrary to the wishes of the president. The extreme and desperate measure of vetoing the entire budget was employed in 1922 by President Pessoa as a protest against excesses practiced by the congress in the handling of the executive proposals; but it involved serious consequences, aroused a storm of criticism, and was even attacked as an unconstitutional use of the veto power. On the other hand, the practice of attaching to the budget law so-called amendments which embody permanent legislative provisions, while the budget itself is an annual measure, is certainly contrary to the spirit of the constitutional provisions relating to the legislative process.[1] The rules of procedure of the houses also forbid it.

If the congress of Brazil, like that of the United States, is prone to exert its power to include items of expenditure without reference to the wishes of the executive branch, it is much less inclined to oppose the executive by eliminating either sources of revenue or objects of expenditure recommended in the proposals, especially as there is no strong and organized opposition party anxious to embarrass the administration and to advertise itself in the eyes of the country as the friend of economy. Generally speaking, harmony with and conformity to the desires of the administration is the price which members of the congress have to pay in order to secure the executive favors which they may want for themselves, their friends, or their supporters, in order to occupy positions of influence in the legislature, and even in order to be reëlected, so that the interests of the general public in favor of economy speak with a relatively feeble voice in comparison with the stentorian tones of the administration.

[1] Araujo Castro, *op. cit.*, pp. 92–94.

In actual practice the budget laws, though submitted early in May by the president, are passed in the greatest haste and amid the greatest confusion in the last days of December. The congress of Brazil prides itself on the fact that since the establishment of the republic it has never failed to vote a budget before the opening of the new budget year, a frequent occurrence during the days of the empire. But that the budget laws are given adequate study even in the committees of the congress, much less subjected to careful consideration on the floors of the two houses, is an assertion which not even the most enthusiastic Brazilian publicist would venture to make.

Another feature of the budget procedure in Brazil which increases the importance of the executive branch of the government in the matter of finances is the practice of authorizing the administration to expend large sums, within certain maximum limits indicated for each item, on projects not contained in the itemized tables. These expenditures are for all manner of objects, the cost of which may not be definitely determinable but for which the government is authorized "to open credits," as the expression is, up to stated amounts, figures which are more than likely to be attained in every case. Since these items are over and above the tabulated totals and are for the most part not provided for in the revenue column, they amount to a predetermined deficit, uncertain in amount but certain in occurrence, which items are paid if and when there is money in the treasury.

The budget laws or law having been passed, signed, and published, each department organizes its detailed budget in accordance with the law and submits the same to the tribunal of accounts for approval. This body, established by the constitution itself (article 89), audits the accounts of receipts and expenditures and examines their legality before they are submitted to the congress in accordance with the second part of the section under consideration. All executive acts relating to receipts or expenditures must be submitted to the tribunal of accounts for its sanction. This must register them as legal and approved or refuse to approve and register them as not being in accordance with the law. In the latter case the matter may be referred to the president, who may approve the proposed act, which must then be registered by the tribunal of accounts under protest and be brought to the attention of the two houses of congress within forty-eight hours. If the congress is not in session, such acts must be brought to its attention within the first fifteen days of its next succeeding session. The same procedure is followed with regard to contracts entered into by the administration under authority granted by law. The congress has no authority to disallow such expenditures or collections, but may hold the president responsible for the illegal acts in question under its general power of impeachment.

By section 11 of the article under consideration the congress of Brazil is given the power, not itself to declare war, as in the United States, but to authorize the government to declare war and to make peace. But this power is limited by the proviso that arbitration shall not have been possible, and by the prohibition of article 88, which forbids the United States of Brazil from ever entering upon a war of conquest, directly or indirectly, by themselves or in alliance with other nations. This, of course, is one of the constitutional limitations for which there is only a moral sanction. Of more practical importance, perhaps, is the provision which authorizes the president to make immediate declaration of war in case of foreign invasion or aggression.

In regard to the treaty-making power, the congress as a whole, and not merely the senate as in the United States, exercises the power of ratification.[1] But, as has already been pointed out, this being one of the matters the consideration of which must originate in the chamber of deputies, a negative reaction by that house would preclude any action by the senate, so that in a sense the lower house may be said to be in a position of superiority.[2] In this respect the Brazilian constitution followed the Argentine model in preference to our own.

The rôle of the congress in the fundamental power of intervening in the internal affairs of the states has already been touched upon. Though this is one of the mooted constitutional questions of vital importance in Brazil, the consensus of opinion is that federal intervention for the purpose of maintaining the republican federal form of government, and more especially for resolving the case of a duality of state governments, represents a political question the solution of which belongs properly to the legislative branch of the government.

More precise is the constitution with regard to the rôle of the congress in the declaration of the state of siege.[3] This is an emergency measure which the congress alone can institute so long as it is in session. Only during the recess of the congress may the executive take action in this direction, which must then be either approved or suspended by the congress immediately upon its next convening.

In declaring in section 25 of this article that the creation and suppression of public offices, as well as the determination of their functions and the amount of the pay, shall belong to the legislative jurisdiction of the congress, the constitution of Brazil follows the American

[1] Constitution of Brazil, art. 34, sec. 12.

[2] The law of October 23, 1891, provided in this regard:

SEC. 3: "The agreements, conventions, and treaties negotiated by the president of the republic, by virtue of the powers conferred upon him by art. 48, sec. 16, of the constitution, shall be submitted to the ratification of the congress by means of a bill framed by the executive power in accordance with the provisions of art. 29 of the constitution." (Quoted in Barbalho, *op. cit.*, p. 11.)

This law was passed following a resolution of the senate calling upon the administration to submit to it the treaty with the Argentine regarding the territory of Missiones, which treaty had, however, already been submitted to the lower house and rejected.

[3] Constitution of Brazil, art. 34, sec. 21; art. 48, sec. 15; art. 80.

rather than the continental European theory of public offices. But in this the republican constitution simply continued the provisions of the imperial constitution of 1824.

The power to grant amnesty is expressly granted to the congress in Brazil, whereas in the United States it is implied. Furthermore, the congress there is given the additional power to commute and pardon the penalties imposed upon public officers for crimes committed in the exercise of their offices. As in the United States, the manner of the exercise of these powers is left to the discretion of the congress, the supreme court of Brazil having declared that inasmuch as the granting of amnesties belongs exclusively to the jurisdiction of the legislative power it can impose conditions or require guaranties in the interests of public order or the demands of justice. This power of amnesty includes also the power to extend the same to persons involved in political crimes against the governments of the individual states.

Of more significance, or at least of more potential significance, in defining the position of the national congress in the organization and functioning of the federal government than any or all of the powers enumerated heretofore, are the functions assigned to the congress with relation to the election and the removal, *i. e.,* the impeachment, of the president, and the removal of the ministers of state and the judges of the supreme court. But these matters can better be treated in the consideration of the executive power later on.

The function of the national congress in relation to the determination of state boundaries and its power of amending the federal constitution, both of them powers which, like those of extending or adjourning its sessions, do not require the sanction of the president, specified by article 16 as being included in the exercise of the legislative power in general, have both been considered already in other connections.[1] There remains to be considered here only one other constitutional question in relation to the position of the congress and that is the important one regarding the delegation of legislative powers.

As will be seen in discussing the powers of the president, the Brazilian constitution expressly confers upon him the power of issuing decrees, instructions, and regulations for the faithful execution of the laws. But it is contended by one of the leading jurists of Brazil, now a member of the supreme court, that the regulatory power of the president is not limited to measures pertaining to such execution. Adopting the French and Italian interpretation of the executive power rather than that of our own constitutional law, this writer[2]

[1] See above, Ch. II, pp. 24, 25, and 50.

[2] Viveiros de Castro, *Estudos de Direito Publico* (Rio de Janeiro, 1914), pp. 410 ff.

inclines not merely to an inherent ordinance power, but also to the propriety of delegation of legislative power by the congress, founded largely on the practical necessity of so doing in view of the volume and complexity of modern legislation. Other writers, however, strenuously contend that such delegation of legislative powers is unconstitutional, limiting the ordinance power of the executive strictly to such measures as accomplish the faithful execution of the laws and citing supreme court decisions declaring null and void executive decrees that violate rights guaranteed by the constitution and laws.[1] The decisions of the supreme court on this question of delegation of legislative powers in Brazil have been conflicting, but in the opinion of one of the most recent authoritative commentators on the constitution there is perhaps no other country where there has been a greater abuse of this delegation of powers than in Brazil.[2] A practice already condemned under the empire, where it was extensively employed, has not diminished under the republic, so that the most important reforms have been accomplished by the executive under legislative authorization. Mention has already been made, in the discussion of the budget procedure, of the broad latitude given the president in the finances of the government; so broad, in fact, that another Brazilian publicist[3] has written: "It can be said without exaggeration that each annual budget law is a collection of delegations of the legislative power." Other critics of this practice of legislative delegation are not wanting, but enough has been said to show that whereas in the United States of America both the congress and the supreme court have been disinclined to strengthen the executive by an extensive grant of the power of supplementary legislation, the opposite practice in Brazil has of course resulted in a diminution of importance of the congress in relation to the executive, even in the distinctive legislative field. Sanctioned now by many years of practice, this is a constitutional tradition which could only with difficulty be broken down, especially under the peculiarities of the political party situation in Brazil. As if to revenge itself for this surrender of legislative power, however, the congress does not hesitate to invade the proper sphere of the executive by stipulating in the laws that certain individuals named shall be given certain offices.[4]

THE PROCESS OF LEGISLATION.

The constitution prescribes in considerable detail[5] the legislative process so far as the participation of the two chambers and of the executive is concerned, leaving the regulation of the legislative process within each chamber to the respective rules of procedure. Measures

[1] Barbalho, *op. cit.*, p. 185.
[2] Araujo Castro, *op. cit.*, p. 103.
[3] Candido de Oliveira in his *Legislação Comparada*, p. 112, cited in Araujo Castro, p. 103.
[4] Araujo Castro, *op. cit.*, p. 104.
[5] Arts. 36–40.

may be introduced by any member in either chamber, with the exceptions already noted in favor of the chamber of deputies, or may be submitted by the executive.

Bills introduced by individual members must be in writing and signed by them and in the senate must be seconded or signed by five members. They are sent to the executive board (*mesa*) and if found in due form are then referred to the appropriate committee. The constitution speaks of two kinds of legislative acts, laws and resolutions. By act of January 7, 1899, the former are defined as measures containing general rules and dispositions of an organic nature or having for object the creation of new rights. The latter are measures establishing administrative rules or provisions of a political character of individual or temporary nature. When duly passed, the latter are designated as legislative decrees.

The first discussion of a bill occurs, as a general rule, only after committee report. The rôle of the committees is an important one, especially in the chamber of deputies, where they are selected for the entire session. Length of service, qualities of leadership, and special capacity in a particular field all play a rôle in the composition of the committees, which are chosen by secret vote of the whole membership, not appointed by the presiding officer, as formerly in the United States, nor chosen by lot, as in some European parliaments. The membership varies from 3 to 15, the usual number being 9 in the chamber of deputies and 3 in the senate.

As a general rule, all bills are submitted to the customary three readings, but certain measures of urgency are put through one discussion only and those coming from the other house through two. It is before the committees that the cabinet ministers appear in person to combat or defend bills. Amendments may be offered on second reading by the committees, or by individual members if supported by five members, and on third reading if supported by a third of the members present in the chamber of deputies or by ten members in the senate.

When duly passed by one chamber the bill is sent to the other for consideration. If passed by the second it is then sent to the executive for signature. If rejected by the second chamber it fails and can not be introduced again in the same session. The same is true of bills that fail of passage in the first chamber and of those which though passed by both chambers and being vetoed by the executive are not repassed by the necessary majority. To this rule there is an exception admitted in the case of the laws relating to the revenues and expenditures of the government and to the laws determining the strength of the military and naval forces of the nation, since the

constitution requires (art. 34, secs. 1 and 17) that these shall be annual measures.[1]

A peculiar feature of the legislative procedure in Brazil is found in the provisions relating to amendments proposed in the chamber to which a bill is sent from the other. In such a case the bill is returned with the amendments to the chamber of origin. This chamber may concur in the amendments by simple majority, in which case the bill is sent to the executive. If, however, the amendments are rejected, the bill is again sent back to the second chamber. There the amendments may be readopted by a vote of two-thirds of the members present, and they will stand as part of the bill unless the chamber of origin again rejects them by a similar majority. The result is that while the second chamber may reject the measures coming to it by a simple majority, it can not insist upon amendments if the original chamber can rally a two-thirds vote in favor of the proposal as originally passed. This obviously gives the chamber of origin an advantage not possessed by the similar body in the United States. On the other hand, it happens not infrequently in the passage of the budget laws, the very ones in relation to which the chamber of deputies is supposed to be in an advantageous position and in regard to which it enjoys the prerogative of initiation, that amendments approved by the senate and rejected by the chamber are repassed by a two-thirds vote in the former and remain as part of the law, because the chamber can not muster the necessary two-thirds vote to reject them.[2] It must not be overlooked, however, that the system of conference committees employed in the United States for reconciling such differences may attain a result unsatisfactory to either chamber.

Bills passed by both chambers are sent to the president for sanction and promulgation. If, however, he considers a bill unconstitutional or contrary to the interests of the nation, he must refuse his approval within 10 working days from the time he receives the bill, returning it at the same time, with the reasons for his refusal, to the chamber in which it originated. The "pocket veto" is expressly prevented by the constitution in the provision which declares that in case he refuses his sanction after the congress has adjourned he must publish his reasons for the same. His failure to veto the bill within the 10 days required implies his approval. The draft constitution of the commission of five, as well as the draft of the provisional government, had adopted the wording of the United States constitution with regard to the effect of the adjournment of the congress in the period of 10 days after a bill is presented to the president. But the committee of 21 of the constituent congress amended the draft

[1] Milton, Aristides, *A Constituição do Brazil*, 2d ed. (Rio de Janeiro, 1898), p. 205.
[2] Araujo Castro, *op. cit.*, p. 91.

by substituting the present text, which was adopted by the congress without discussion. Under the empire the failure of the emperor to act upon a bill within the period of 30 days was equivalent to a veto.

When a vetoed bill is returned by the president to the chamber of origin it is there discussed in a single reading and submitted to roll-call, being considered repassed if supported by a vote of two-thirds of the members present. It is then sent to the second chamber and if there repassed in the same way and by the same majority it is sent as a law to the executive to be promulgated as such. If the president fails to promulgate a law not vetoed by him within the 10-day period, or if vetoed and repassed, as provided by the constitution, the president or vice-president of the senate shall within 48 hours promulgate the same.

The acts of the congress which do not require the sanction of the president are those relating to changes in the state boundaries (art. 4), the extension or adjournment of the sessions (art. 17, sec. 1), and amendment of the constitution (art. 90).[1]

[1] Barbalho, *op. cit.*, p. 53.

CHAPTER IV.

THE FEDERAL EXECUTIVE.

THE PRESIDENCY.

As to the constitutional position of the executive power in the new republican federal state of Brazil there was very little difference of opinion among the men who were chiefly responsible for the change from the unitary empire to the federal republic. Generally speaking, the various draft constitutions followed the model afforded by the United States, but in certain respects variations of more or less importance were introduced.

The president of the republic is designated, in the first paragraph relating to the executive power, as the elective chief of the nation, and that describes in a sentence his real position, elaborated in more detail in the provisions relating to his powers.

As regards the qualifications for this office, the Brazilian constitution insists, like ours, on native citizenship and on the completion of 35 years of age. But instead of the requirement of 14 years of residence within the country, it insists on the candidate's being in the exercise of his political rights, which means that he must not have suffered their suspension or loss on any of the grounds enumerated elsewhere in the constitution.[1] The constitution, furthermore, makes ineligible for the office the person who occupied that office in the preceding term;[2] the vice-president who may have succeeded to the office during the last year of such term or who was acting as such at the time of the election;[3] the relatives by blood or marriage, in the first or second degrees, of the president or vice-president who is in the exercise of the office at the time of the election or who was so within six months before;[4] and the ministers of state.[5] As in the case of the qualifications for members of the congress, the constitutional provisions with regard to the ineligibility for president and vice-president have been elaborated and even amplified by ordinary legislation, a practice of doubtful constitutionality. So the election law not only defined the "last year of the presidential term," relating to the ineligibility of the vice-president who has succeeded to office, as the year preceding the election in March and not the year preceding the end of the term in the following November,[6] but also extended the ineligibility of ministers of state to those who may have occupied such office for six months prior to the election.[7]

[1] Constitution of Brazil, art. 71; art. 72, sec. 29.
[2] *Ibid.*, art. 43. [3] *Ibid.*, Par. 1. [4] *Ibid.*, art. 47. [5] *Ibid.*, art. 50.
[6] See Barbalho, *op. cit.*, p. 166.
[7] Election law of December 27, 1916, art. 38.

All these provisions relating to the ineligibility of the preceding president, of the vice-president who succeeds to office during the last of the term, of the relatives of the same within the first two degrees of relationship, and of the cabinet ministers are limitations not found in the constitution of the United States, but taken rather from the experience of the other Latin-American countries with regard to the necessity of safeguarding the presidential succession from the personal or family ambitions of the individuals actually exercising the supreme executive power. The same is true of the express provision insisting that the president must cease absolutely to exercise his functions at the end of the presidential term.[1]

All of the various constitutional drafts agreed in making the president ineligible for immediate reëlection, the draft of the commission of five having even stipulated that two presidential periods must have intervened before reëlection could take place, and, though the other subsequent drafts reduced this period to one presidential term, there seems to have been virtual unanimity with regard to the advisability of prohibiting immediate reëlection, in spite of the fact that the opposite rule had been in operation without serious results for more than a hundred years in the United States of America. Barbalho, himself a member of the constituent congress, justifies this departure from the American prototype by specific reference to the experience of Mexico and Chile.[2]

In this connection it may be noted that the draft constitution of the provisional government provided for a term of six years, a period which had been suggested for the president of the United States in connection with a provision against reëligibility, and one which was in effect in the Argentine in connection with the ineligibility provision. But on the floor of the constituent congress an amendment was adopted that reduced the term to four years while still keeping the prohibition against reëlection. Barbalho points out that this was an unfortunate change, not because six years is a better length of term, but because the term of the lower house of the congress having been fixed at three years it would happen only once every twelve years that the presidential election synchronized with the renewal of the lower house and the partial renewal of the senate. The same situation that we have in the United States when a president elected by one party finds himself opposed by a house of representatives chosen in the middle of his term by the opposing party could occur under aggravated conditions in Brazil, for there the president might have to contend for three years with an opposition chamber of deputies chosen in the year following his own election.

[1] Constitution of Brazil, art. 43, sec. 2.
[2] *Op. cit.*, p. 166.

In the manner of electing the president, moreover, the Brazilian constitution departed from our own example, though this had been followed by the Argentine. The history of the adoption of the principle of direct popular election of the president in the Brazilian constitution is full of interest and worthy of at least brief mention.[1] All three of the draft proposals considered by the original commission of five adopted the principle of indirect election, though along different lines. As finally incorporated in the draft constitution submitted to the provisional government by this commission the method of election was similar to that provided in our federal constitution, except that the number of presidential electors in each state was fixed at ten times the number of representatives in the national congress. The provisional government in its draft constitutions adopted the same system, merely reducing the number of presidential electors in each state to double the number of deputies and senators from that state. Up to the time of meeting of the constituent congress, therefore, the twofold principle of indirect election and roughly proportional voting power of the states had been approved in line with our own system.

But the committee of 21 of the constituent congress, charged with examining the project of the provisional government and reporting on it to the congress, made a radical departure from the proposed system, one of the relatively few fundamental changes proposed by that committee. Under the system proposed by this committee, election for president would be by states, each state casting one vote for the candidate who had received a majority of the direct popular vote in that state. The committee conceived that by this method it would eliminate the evils of the indirect vote, discredited in the United States in the election of president, and in the empire in the election of deputies prior to 1881, and at the same time emphasize the federal nature of the new government by putting the states on a basis of equality in this fundamental matter. A minority report was made in opposition to the method proposed, and after considerable discussion and the submission of various other amendments the congress finally adopted, by the narrow vote of 88 to 83, a substitute providing for direct election of the people by absolute majority of votes. The greatest confusion reigned at the time of the vote on this second reading, and a roll-call was demanded but, in the face of vehement protests and threats of leaving the hall by the supporters of the system of direct election, was refused. Even so, some of the persons who voted for the amendment were in favor of indirect election, but wanted to avoid election of the first president by this same congress, a result which they failed of attaining, because the transitory provisions re-

[1] This history is well summarized in Barbalho, *op. cit.*, pp. 174–179.

tained this very feature. Thus was the system of direct election adopted by a procedure which leaves it in doubt whether or not it was regularly and consciously approved by a majority of the members of the constituent congress.[1]

More than 600 amendments in all were offered relating to the method of electing the president, but all later ones failed of adoption save one, which provided for election by the congress in case no candidate received an absolute majority, the prior amendment having stipulated a new election. No feature of the constitution aroused more discussion than did this question of the method of electing the president. As finally approved, it has been regarded as the best possible method by some[2] and as a serious error by others.[3]

The election for president and vice-president occurs on the first day of March of the year in which the presidential term ends, that is, every four years beginning with 1894. The project of the provisional government, suggesting, as has been seen, a presidential term of six years, fixed the end of the first presidential term at November 15, 1896. The constituent congress adopted the amendment reducing the term from six to four years, but rejected an amendment changing the end of the first term from 1896 to 1894. In spite of that fact, the chair in submitting this part of the constitution on second reading included the change in question, and it was voted in that form and became part of the completed instrument. (See Barbalho, *op. cit.*, p. 43.) The qualifications for voting and the election machinery are the same as those described above for the election of members of the congress, *mutatis mutandis;* that is, there is no minority feature. Each voter casts separate ballots for president and for vice-president, an absolute majority of votes being required for election in either case. The canvass of votes takes place, as already described, in the capital of each state and in the federal capital for the federal district, the results being sent to the vice-president of the senate.

The constitution requires that the congress shall examine and verify the canvass in the first session of the same year, which opens on May 3, with whatever number of members are present. The procedure followed by the congress in joint session for the canvass of the votes for president and vice-president is fixed by rules of procedure adopted on August 22, 1892.[4] The canvass is made by the executive board (*mesa*), consisting of the vice-president of the senate as chairman and the first and second secretaries of each chamber as secretaries. In this work the board is assisted by five commissions chosen

[1] Prazeres, Otto, *A Presidencia da Republica* (Rio de Janeiro, 1922).
[2] Barbalho, *op. cit.*, p. 178.
[3] Prazeres, *op. cit.* Intro., p. XII; Milton, Aristides, *A Constituição do Brazil*, 2d ed. (Rio de Janeiro, 1898), pp. 224, 225.
[4] *Manual do Deputado, Imprensa Nacional* (Rio de Janeiro, 1921), pp. 436 ff.

by lot from among those present. Each commission consists of six members, and to each commission is assigned the work of examining the election returns from certain definite states. Each commission reports its findings to the board within five days, which then makes a final report to the congress, based on its examination of the reports of the commissions. This report is acted on in a single reading, any member being privileged to offer amendments.

If the report of the board finds that the highest candidates for the two offices received an absolute majority of the votes cast and the congress adopts such report, the president of the congress declares them elected. If not, the congress itself elects by secret vote one of the two highest candidates for the position or positions not filled by the direct election. In case of a tie, the elder of the two candidates will be declared elected. The difference between the procedure followed in Brazil, in the congressional count of the vote and in the election by congress in the absence of an absolute majority, and that of our own system is obvious and was established after bitter and prolonged debate. In its essence, however, it is fundamentally the same, in that the final determination of the results of the presidential election rests with the congress, and in certain cases the actual election may occur there. Much criticism was directed, particularly in the heated campaign of 1922, against the position of the congress as final judge of the validity of the presidential-election results, and the defeated candidate and his supporters demanded a court of honor to pass upon the question, somewhat along the lines of the special commission in the Hayes-Tilden controversy in the United States in the election of 1876 and the court of honor in the Chilean election of 1921. Upon refusal of the majority to constitute a special body for the canvassing of the presidential vote, the opposition members withdrew from the sessions and refused to take part in the process.

The proposal of the minority was based on the proposition that there was gross fraud in the elections, and that as the successful candidate had been approved in a political caucus or convention in the June preceding the election, and as the majority of the congress belonged to the group which had constituted this convention, there was no chance that the apparent victory of Dr. Bernardes at the polls in March would be impugned by the congress when passing on the validity of the election. Consequently, their only hope for a fair and impartial examination was alleged to lie in the selection of an extralegal body which would investigate the count and make a report which would then be morally binding upon the congress. The majority rejected this proposal as contrary to the express provision of the constitution which imposes upon the congress the duty of passing upon the results.

It is not my purpose to go into the questions of fraud alleged by the unsuccessful candidate, Dr. Nilo Peçanha, if for no other reason than because it would be absolutely impossible for anyone in my position either to prove or disprove them; nor is it my purpose to pass upon the constitutionality or expediency of the measures suggested by the unsuccessful party. It is of interest, however, to point out that it is not beyond the bounds of possibility that the national congress could vitiate the results of the popular vote for president, either by refusing to exclude votes improperly cast for a candidate or by refusing to count votes properly cast for his opponent. The answer to this obvious objection is simply that somewhere there must reside the ultimate power to pass upon the election results with the inherent possibility of falsification. On the whole, it is better that this essentially political function rest with the body of the representatives elected by the people than with the president in power, even though he is ineligible for reëlection, or with the supreme court, the ultimate effectiveness of which depends upon its remaining outside the field of partisan politics.

A brief survey of the presidential elections so far held in Brazil will throw some light both on the process of choosing a president and on his political relations with the congress which has the final word on the validity of his election. Since the establishment of the republic in 1889 there have been ten presidential elections, including the one in 1922, already referred to, each one of which presented some features of interest from the point of view here under consideration.

The first election was by the congress itself, in accordance with the transitory provisions of the constitution, and occurred on February 25, 1891, the day after the promulgation of the constitution. The congress chose for president Marshal Deodoro da Fonseca, the military chief of the republican revolution, who had been in power as chief of the provisional government since November 15, 1889. He received 129 votes out of 234 cast, the next highest candidate, Prudente de Moraes, who had been senator from the state of São Paulo and president of the constituent congress, receiving 97 votes. The selection of Fonseca was almost dictated under the circumstances, though opposition had already developed against him in the constituent congress, an antagonism which steadily increased and finally culminated in his illegal dissolution of the congress on November 3, 1891, resulting in a revolt of the navy and the resignation of the president on the 23d of the same month. Under the provisions of the constitution there should have been a new election for president, as the vacancy in the presidential office occurred during the first biennium, but the vice-president, Marshal Floriano Peixoto, with the approval of the congress, continued to fill out the term, a period of disorder and revolution throughout a large part of the republic.

The first president to be elected by popular vote was Senator Prudente de Moraes, the second highest candidate in the election by the congress in 1891, the first president of the state of São Paulo. The count of votes by the congress in 1894 consumed 32 days, although the result was never in doubt, the final results giving the successful candidate 290,822 valid votes, against 38,291 for his opponent, Affonso Penna, who was elected vice-president six years later and president in 1906. In the count by the congress the number of votes admitted for the successful candidates was more than 40,000 greater than the returns made by the state canvassing-boards, owing to the fact that many districts sent the returns directly to the senate instead of to the state boards. The final count as submitted by the executive board and approved by the congress even allowed 14,000 votes more to the successful candidate than had been admitted by the reports of the commissions.

In the election of 1898 the congress recognized 420,286 valid votes for Campos Salles, against 38,929 for Lauro Sodré. The former had also been senator from the state of São Paulo in the constituent congress and was president of that state at the time of the election. The latter had been a deputy in the first congress from the state of Pará in the north. There was no serious contest in this election, although a deputy from São Paulo censured the successful candidate for retaining the presidency of the state while a candidate for president. Several amendments were proposed to the report of the executive board, but they were all voted down, the procedure having taken 49 days.

In 1902 the congress spent 28 days in the examination of the election results, the final count giving 592,039 valid votes to Rodrigues Alves, the largest popular vote ever cast for any candidate for president in Brazil, his opponent receiving but 42,542 votes. Alves also had been a member of the constituent congress as a deputy from the state of São Paulo and was president of that state when nominated for office. The process of canvassing the votes proceeded practically without controversy.

In 1906, likewise, no questions of importance arose, in connection with the election of Affonso Penna, whose opponent, Lauro Sodré, defeated candidate in the elections of 1898, received only 4,865 votes. Affonso Penna, a native of Minas Geraes and former president of that state, had been elected vice-president in 1903 to succeed the one who had died before assuming office. He obtained 652,247 votes in that election, against 42,766 for his opponent, this representing the largest number of votes ever cast for one candidate for either office in Brazil.

In 1910, on the other hand, the canvassing of the popular vote by the congress was of dramatic interest. The opposing candidates for

office were Marshal Hermes da Fonseca, a nephew of the first president and representative of the military element, and Ruy Barbosa, member of the provisional government of 1889, senator from Bahia in the constituent congress, and popularly known as the author of the Brazilian constitution. The process of canvassing the vote in this election required 74 days and the final count gave 405,867 valid votes to Marshal Hermes and 222,822 votes to Ruy Barbosa, the largest vote ever obtained by a defeated candidate for the presidency until the recent election of 1922. The minority alleged ineligibility of Marshal Hermes for the office and also fraud in the elections as grounds for declaring Ruy Barbosa elected, but were outvoted by more than 3 to 1.

The next election, in 1914, again was accompanied by no controversies in the process of canvassing by the national congress, the whole process requiring but 9 days, the shortest period required up to that time. The successful candidate, Wenceslão Braz, was accorded 532,107 valid votes, against 47,782 for Ruy Barbosa, the defeated candidate of the preceding election. Wenceslão Braz was a native of Minas Geraes, of which state he was president at the time of his election as vice-president of the republic in 1910.

In 1918 Rodrigues Alves was reëlected without serious opposition by a vote of 390,910, but was too ill to assume office and died in January 1919 a new election for president being held, in accordance with the constitutional provision, in April of the same year. The congress declared Epitacio Pessoa elected by 296,525 votes, against 120,139 validly cast for his opponent, Ruy Barbosa. Epitacio Pessoa, another member of the constituent congress of 1889 and senator from the small northern state of Parahyba, was at the time of his election a member of the Brazilian delegation at the Versailles peace conference.

This brings us to the recent election of 1922, which was the most bitterly contested election of all. One of the opposing candidates was Nilo Peçanha, senator from the state of Rio de Janeiro, a former governor of that state, member of the constituent congress, elected vice-president of the republic in 1906, and succeeding to the presidency in 1909 upon the death of Affonso Penna. He presented himself as the candidate of the "Republican Reaction," against the candidate approved by the congressional caucus in June 1921, Arthur Bernardes, president of the state of Minas Geraes. The campaign was carried on with great vigor and bitterness, and charges of fraud and corruption were freely made. The provisional returns having shown Arthur Bernardes to have received a majority, the opposition requested a special commission for the canvass of the votes, which being refused the opposition withdrew from the session. The congress by unanimous vote then approved the report of the executive board, according 466,877 legal votes to Arthur Bernardes, against 317,714 for his opponent. Over 800,000 voters came to the polls, the largest number

that ever took part in a presidential election in Brazil, though even then only about 60 per cent appeared at the polls, the total number of registered voters at the time being something over 1,300,000.

In the light of this brief survey it may be permissible to venture some cautious conclusions. The first one, however, should be that the experience of Brazil in choosing presidents has been so limited that almost any generalizations would be based on insufficient data, and that for the same reasons some of the comments most frequently made must be estimated in the light of that insufficiency. One general statement that seems to be sufficiently borne out by the facts is that the caliber of the men elected to the highest office in Brazil has been remarkably high. Of the 8 men chosen by popular vote, 4 were members of the constituent congress that framed the constitution for the republic; 6 had been presidents or governors of their own states, 1 had attained the highest rank in the army after 35 years of active service, and 1 had been senator, member of the supreme court, and honored with the most important diplomatic post at the disposal of the nation. President Alves and President Penna had both occupied important administrative positions under the empire.

Of the eight men who have been elected to the presidency, three were from the state of São Paulo and three from the state of Minas Geraes, the other two being natives of Rio Grande do Sul and Parahyba, respectively. This fact has frequently been made the basis of adverse criticism, as showing political domination of the country by these two states to the exclusion of other sections. But São Paulo and Minas together, though by far the most populous states of the Union, contain considerably less than half of the registered voters (509,000 out of more than 1,305,000 at the time of the last election) and in the lower house of the congress total only 59 out of 212 members, while in the senate their strength is only 6 out of 63. In the congress in joint session when the presidential vote is counted they muster only 65 out of a total of 275.

The political control by these two states is not due solely, therefore, to their voting power or to the strength of their representation in the congress. It is the result also of the prominent rôle they played not merely in the separation of Brazil from Portugal in 1822, not to go any farther back in Brazilian history, but also in the republican movement which resulted in the overthrow of the empire. It is the result, moreover, of an orderly history since 1889, compared with most of the other states, and, above all, of an ability to work together, which gives them a decided superiority over the smaller states, which, though almost unanimous in their outcry against the domination of the big states, are unable to engage in concerted action.

Due to the absence of any political parties in Brazil since the triumph of the Republican Party in 1889, the process of nominating a

candidate for the presidency resolves itself into an understanding between the controlling political forces of the more important states, especially of the two major states. This understanding is then ratified by a convention which is largely composed of the members of congress, who, as has been seen, are the supporters, if not the political creatures, of the state administrations. It is here that the smaller states could by united action defeat the combination of even the six largest states. Once the central convention or caucus of the Republican Party approves the candidacy of the man agreed upon, the only thing left to those not satisfied with this action is to put an opposing candidate in the field, a candidate without party organization behind him and usually with no other unity of purpose among his followers than dissatisfaction with the choice of the majority.

Under such conditions it is easy to understand the astonishingly small vote obtained by the unsuccessful candidates in most of the elections without seeking for the explanation of that fact in duress, corruption, or fraudulent canvassing of the votes. In the last presidential election the opposition, or "reaction" as it termed itself, made great capital out of its protest against the oligarchical rule of the major states, and yet it succeeded in securing a majority in only 6 of the 19 units outside of the two major states. It may not be amiss to point out, moreover, that the unsuccessful candidate received a large majority in the federal district itself, where the national administration could most easily have used its power in improper influence in favor of the majority candidate.

An observer for many years of Brazilian politics[1] considers it a grave error of the constitution that it did not expressly declare the governors or presidents of states ineligible for the presidency. After asserting, what is almost universally recognized to be the case, that the state executives are openly and in fact the political bosses or chiefs in the states and as such wield a decisive influence in federal politics, he opines that the effects of this influence would be much modified if they were unable to stand as candidates for the presidency. His account of the actual process of selecting a presidential candidate is sufficiently interesting to merit quotation:

> Those who know the secrets of Brazilian politics or who are able to follow what happens in the wings of the political stage at the time when candidates for the presidency are to be chosen are perfectly aware that with the rarest exceptions the president or governor of a state who is consulted with regard to a name proposed for president never opposes this name * * *.
>
> Why? Because he sincerely believes that the person named should be president of the Republic?
>
> No; the state president or governor accepts such name with a great mental reservation and an equal amount of alacrity * * *.

[1] Prazeres, *op. cit.*, Introduction, pp. XII ff.

In giving his acquiescence to the candidacy, this governor nourishes the hope that the name mentioned will not succeed; but, inasmuch as an influential politician is in question, said governor would not for the love of God have it known that he does not accept *with joy and satisfaction* the name proposed, because to-morrow when this boom has evaporated he does not care to have the eliminated candidate oppose his own candidacy.

Here is the explanation of the wreck of many presidential candidacies which appeared to have the support of a great majority of the state political leaders. This support is given solely "from the teeth out," as the saying is. The heart enters therein not the least bit.

The incompatibility of state governors and presidents would completely put an end to such things, diminishing appreciably this sad aspect of national politics, for it is one thing to struggle for one's own self and another to struggle for political friends.

Besides the state governors and presidents, there are always on the political stage, at the time when candidates for president and vice-president are to be chosen, half a dozen "edibles," and these are the ones who prepare in the shade the "casting to the wild beasts" of the first-mentioned names.

Simulating a reserve in the matter and pretending to be wholly disinterested and calm, these aspirants use all the means at their disposal to accomplish the launching of these booms. For this purpose they whet the appetites of the governors and presidents to launch their own names, exhibiting false probabilities of success.

Out of this confusion and struggle of state governors and presidents it is quite possible that there may emerge the candidacy of him who so skilfully troubled the waters.

As soon, however, as the names of the state presidents and governors themselves could no longer enter into the game, matters would be greatly improved and the combinations for the choice of candidates for the presidency of the republic would assume a type quite different from the one so far exhibited.

However accurate may be this graphic picture of the nominating process in Brazil, and however correct as to the results prophesied from making the state executives ineligible for the office of president, it must be said that the presidents of Brazil up to the present have been, almost without exception, men of the highest education and culture, of unimpeachable social and professional standing, and of extended experience in the political and administrative field. It would certainly not be an exaggeration to say that on the average they would not fall within the category of mediocrity, to which James Bryce condemned our presidential average.

All these features of the nomination and election of the president play their rôle in the preponderance of the executive power as a political factor in the government of Brazil, quite apart from the elevated position assigned to him by the constitution in the powers of the office, which will be examined farther on.

THE VICE-PRESIDENCY.

In the constitutional treatment of the vice-presidency the Brazilian constitution followed closely our own, stipulating the same conditions of eligibility as for the presidency, simultaneous election by the same

electorate for the same period, substitution in case of temporary disability and succession in case of vacancy, and presidency of the senate. There is the same hiatus in the Brazilian constitution as in our own with regard to the manner of determining the disability (*impedimento*) of the president, but a curious departure from our own system is found in the provision[1] that in case of vacancy in the presidency before two years of the presidential term have elapsed there shall be a new election. This amendment to the draft constitution of the provisional government was introduced by the committee of 21 of the constituent congress, and, justified on the ground that the nation should not have as chief magistrate for a long period a person who had not been elected for that high post,[2] was accepted with a slight modification by the congress in its present form. Up to the present time this situation has already arisen twice. In November, 1893, President Fonseca resigned after 9 months of his term had passed. But Vice-president Peixoto ignored the express requirement of the constitution in this regard and was supported by the congress in that action, remaining in office until November, 1894. In 1919, however, when President Alves died two months after the beginning of his legal term, Vice-president Delphim Moreira ordered a new election to be held in April of the same year, the election law prescribing that the new election shall be held within 3 months of the occurrence of the vacancy.[3] The same provision relates to a vacancy in the vice-presidency under like conditions, a case which has also already arisen several times.

In this connection it may be of interest to mention a curious situation that arose in the last presidential campaign, unique in so many respects. The vice-president elect, Dr. Urbano Santos, successful at the polls on March 1, died on the following May 7. This was before the national congress had begun its canvass of the votes for president and vice-president. The supporters of the opposition candidate for the vice-presidency, J. J. Seabra, claimed that he was entitled to the place under art. 36 of the election law of 1916, which provides that in case of ineligibility of the successful candidate the next highest candidate may be declared elected only if he obtained more than half as many votes as the one declared ineligible. Dr. Seabra fulfilled the latter condition, but the question was whether the death of the successful candidate at the polls constituted "ineligibility," within the meaning of this provision, or whether a "vacancy" had occurred, necessitating a new election. This raised the further question whether the popular election on March 1 filled the office or whether the election was incomplete until after the canvass by the national congress.

[1] Constitution of Brazil, art. 42.
[2] *Annaes do Congresso Constituinte*, Vol. I, p. 80.
[3] Law No. 3,208, of December 27, 1916, art. 2, par. 2.

Aside from the legal questions involved in the case, which called forth countless articles in the public press pro and con, there was the obvious political consideration involved. If the views of the supporters of the "ineligibility" theory were accepted, the result would be to put into the office of vice-president a leader of the bitter opposition to the president, against the expressed wishes of a large majority of the votes cast for that office, with the possibility that this minority candidate might succeed to the presidency itself in case of death or other disability of the president. Such a situation could hardly be admitted by a legislature which contained an overwhelming majority of supporters of the successful faction, and the congress therefore resolved by unanimous vote, the opposition members having withdrawn, that a new election for vice-president should be held in accordance with the law governing cases of vacancy in the office before two years of the term have passed.[1] It must not be overlooked, however, that the unfortunate political results of declaring the candidate of the minority party elected would actually flow from a legitimate case of ineligibility within the clear terms of the law.

As a sequel to this decision of the congress, an interesting case arose in the supreme court of Brazil when the unsuccessful supporters of the minority candidate for the vice-presidency sought a writ of *habeas corpus* in that tribunal to assure him his seat in spite of the adverse finding of the congress. The writ was denied by a divided court upon appeal from the decision of a federal judge in the federal district granting the same. The decision of the court was based principally on the ground that the question involved was a political question and therefore did not fall within the jurisdiction of the judiciary,[2] a decision of particular interest in view of the attitude of the same court a few months later in regard to the case in the state of Rio de Janeiro.[3]

Barbalho in his discussion of the vice-presidency[4] regards the office as unnecessary and unfortunate, since the office of vice-president is of subordinate importance, and less attention is paid to the qualifications of the candidates for this office, who nevertheless, under the constitution, may occupy that post for two years. He cites the cases of Tyler, Fillmore, and Johnson in the United States, quoting from A. de Chambrun, *Du pouvoir executif aux États Unis,* as examples of the defects of this system of providing for the succession to the presidency. The unsatisfactory character of the caliber of men sometimes selected as candidates for the vice-presidency in the United States has been sufficiently noted by American students to require no further evidence. But it does not seem that Brazil has in

[1] *Diario do Congresso Nacional,* Vol. XXXIII, No. 30, June 8, 1922, p. 786.
[2] *Jornal do Commercio,* Rio de Janeiro, July 4, 1922.
[3] See below, p. 110. [4] *Op. cit.,* p. 161.

practice experienced this particular misfortune. Two of the vice-presidents of Brazil were subsequently elected to the presidency,[1] and the three who succeeded to the presidency because of a vacancy in the latter [2] were not regarded as of inferior caliber.

The further succession to the office of chief executive in Brazil in case of incapacity of both president and vice-president is regulated there by the constitution, not by ordinary law, as with us. The order of succession there established is as follows: the vice-president of the senate, the president of the chamber of deputies, and the president of the supreme court, in the order named. If, therefore, the elections for president and vice-president should not be held, or if both men should die before assuming office, there woud be no vacancy in the chief executive post of the country.

CONSTITUTIONAL POWERS OF THE PRESIDENT.

An examination of the constitutional powers of the Brazilian president in comparison with those of the president of the United States of America shows that the former is expressly accorded virtually all the powers assigned to the latter and that in some respects his constitutional sphere of action is even greater.

In the field of legislation, he enjoys, as has been noted, not merely the power of calling the congress together in special session and of submitting messages and recommendations, but also of submitting specific projects for enactment into laws by the ordinary process of legislation. He appears in person before the congress on the occasion of taking his office, but not for the reading of his annual message, which is sent to the secretary of the senate on the opening day of the sessions and is read before the joint session of the two houses.

The veto power is also modeled along the lines provided in our constitution, except that the "pocket veto" is prevented by the requirement that if the president disapprove of any bill after the congress has adjourned he must make public his reasons for the veto. The president of Brazil does not, any more than does our president, have the power of partial veto, but the granting of such a power is regarded by some as an amendment of immediate urgency,[3] especially in connection with the appropriation measures and the riders thereto.

The constitution of Brazil is more explicit than our own with regard to the grounds for the presidential veto. It establishes as such grounds not merely the alleged unconstitutionality of measures, the basis for most of the presidential vetoes in the United States during

[1] Affonso Penna and Wenceslão Braz.
[2] Floriano Peixoto, Nilo Peçanha, and Delphim Moreira.
[3] Assis Chateaubriand, *El Brasil Politico y Social*, in *La Nación*, of Buenos Aires, Brazilian centenary number, September 7, 1922, p. 87.

the first forty or fifty years of our history, but also the broad basis of their being considered by the president as contrary to the interests of the nation. In practice the veto has not been used freely in Brazil, due to the preëminent position of the executive and the normal aquiescence of a majority of the congress in his wishes, though it must be recalled that during the first thirty years of our national life, which is the term that has just elapsed in the history of the Brazilian federal union, vetoes were also very rare. Rarer still, and for the same reasons, is the repassage, by a two-thirds vote of the congress, of measures vetoed by the president.

A very important power of the president in regard to legislation has already been touched upon in a discussion of the power of the congress to delegate legislative functions. One of the foremost Brazilian jurists, a member of the supreme federal court,[1] accepts the principles of French and Italian constitutional and administrative law in holding that not only may the congress delegate broad powers of supplementary legislation to the executive in the elaboration of general norms, but also in claiming for the executive an inherent power of ordinance so long as not conflicting with established laws. Barbalho,[2] on the other hand, limits the extent of the power conferred upon the president in art. 48, sec. 1, to issue decrees, instructions, and regulations, for the faithful execution of the laws, to such as accomplish strictly that purpose, without altering existing law in any respect. But owing to the traditional position of the executive in Brazil and his salient rôle in the republic, he has in practice made extensive use of the ordinance power, encouraged by a wide latitude expressly accorded him by the congress in budget laws and other laws relating to the public administration, and not consistently checked by the supreme court in the relatively few cases in which this question has been before that body for determination.

As head of the administration, the president is given general power to fill all federal, civil and military offices, saving the restrictions expressed in the constitution. These restrictions relate to clerical positions in the two legislative chambers and to clerical and judicial officers connected with the federal courts, which are filled by those bodies respectively.[3] They relate also to the judges of the supreme court, diplomatic ministers, and members of the court of accounts, nominations to all of which offices must be approved by the senate.[4] They relate, finally, also to the lower federal judges, who must be proposed by the supreme court,[5] and to the attorney-general (*procurador geral*), who must be selected from among the members

[1] Viveiros de Castro, *Estudos de Direito Publico*, pp. 410–418.
[2] *Op. cit.*, pp. 184, 185.
[3] Constitution of Brazil, arts. 18 and 58, sec. 1.
[4] *Ibid.*, arts. 48, sec. 12, and art. 89.
[5] *Ibid.*, art. 48, sec. 11.

of the supreme court.[1] From this it appears that not only does the Brazilian constitution entrust the appointing power to the president alone, as a general rule, instead of to the president by and with the advice and consent of the senate, as is the general rule with us, but consuls and department heads, who, in the United States must be so appointed, are in Brazil expressly made subject to the sole appointing power of the president.

One other point in connection with the appointing power is worthy of notice. Under our constitution the congress may by law vest the appointment of such inferior officers as they think proper not merely in the president alone but in the courts of law or in the heads of departments. In Brazil, on the other hand, the power to appoint to public office, with the limitations just noted, is designated as belonging exclusively to the president. In practice, however, this interpretation has not been followed, for the power of appointment to a considerable number of public offices has been conferred in large measure upon the ministers and even upon divisional chiefs under them.[2]

Finally article 73 of the Brazilian constitution incidentally recognizes another limitation on the free appointing power of the president when it modifies the declaration that public offices shall be open to all Brazilians, provided the requirements of special fitness which may be established by law are met. It would seem, moreover, that the express power of congress to create federal offices, to fix their functions, and to determine their remuneration (art. 34, sec. 25) could be held to include the power to determine the qualifications for the same.

In actual fact the great majority of subordinate federal offices are filled by the system of competitive examinations, as a result either of legislative acts or of executive ordinances or regulations, and promotions are also subject to specific regulations. The most lucrative and important posts are, of course, at the disposal of the president or his ministers free of any legal restrictions. As in the United States the power of patronage in Brazil is an effective political weapon in the hands of the administration, reaching down, on occasion, to posts which are supposed to be filled solely on the basis of merit.[3]

Equally important as an administrative power is the power of removal, about which nothing is specifically said in the constitution save with reference to specified offices. The ministers of state are expressly subjected to the unrestricted removal power of the president,[4] the federal judges are appointed for life and removable only by judicial sentence,[5] and officers of the army and navy can be

[1] Constitution of Brazil, art. 58, sec. 2. [2] Araujo Castro, *op. cit.*, p. 311.
[3] See Cruz, Alcides, *Direito Administrativo Brasileiro*, 2d ed., p. 91.
[4] Constitution of Brazil, art. 48, sec. 2.
[5] *Ibid.*, art. 57, including the Supreme Military Court judges (art. 77, sec. 1).

deprived of their commissions only by judicial sentence involving imprisonment for more than two years.[1]

Otherwise, the American doctrine with regard to the removal power of the president has been accepted in Brazil, viz., that the removal power is incident to the power of appointment, even to the extent of admitting that the removal power resides in the president alone with regard to the offices filled by him with the approval of the senate.[2] Constitutionally, therefore, there is no hindrance to the free use of the removal power for personal or partisan considerations such as developed with the spoils system in the United States. But by virtue of laws, legislative and executive, as well as by administrative regulations, conditions may be attached and have been attached to a vast number of positions in the administrative service of the government which limit the absolute discretion or at least the absolute arbitrariness of removals. These conditions, recognized in the later decisions of the supreme court, which was at first inclined to deny any permanency to public offices other than those specifically mentioned as subject to removal under express limitations, vary all the way from mere requirements that the officers be informed of the reasons for their removal to provisions that they shall hold office during good behavior (*emquanto bem servir*). This latter phrase was at first interpreted in the American sense of being equivalent to appointment for life, which positions are specially protected by the constitution (art. 74), as are also the appointments for a definite term of years, neither of which is subject to removal save by judicial sentence. But the prevailing opinion seems now to be that appointment "while they serve well" differs, on the one hand, from appointment "during good behavior" (*vitalicio*), which requires judicial sentence for removal, and, on the other hand, from "removable at will" (*ad nutum*), which leaves the removing power wholly unhampered. For this class of appointments (*emquanto bem servir*), which are numerous, an administrative procedure would seem to be required to establish the failure to serve well, akin to our provisions regarding removals "for the good of the service." The actual status of the presidential removal power in Brazil is still in a state of considerable confusion,[3] but undoubtedly a number of positions which are or should be regarded as permanent are in practice at the disposal of the administration on other grounds than those of effectiveness of the service rendered.

One of the chief abuses in the administrative system of the empire was the accumulation of public offices and emoluments, an abuse that was continued from the days of the Portuguese kingdom in spite

[1] Constitution of Brazil, art. 76.
[2] See Araujo Castro, *Estabilidade de Funccionarios Publicos* (Rio de Janeiro, 1917) Ch. III
[3] See Araujo Castro, *Estabilidade de Funccionarios Publicos*.

of decrees prohibiting the practice. The constitution of 1891, therefore, forbade the accumulation of salaried positions in express terms (art. 73), but the execution of the provision immediately aroused the antagonism of the interested parties, and in January 1892 the congress passed a law permitting the simultaneous exercise of public functions which fell by their nature within one and the same catagory of professional, scientific, or technical functions. This emasculation of the constitutional prohibition was vetoed by President Fonseca as unconstitutional, but was reënacted by the necessary two-thirds vote. In its application it was the occasion of so much abuse that the vice-president who succeeded him in his office, Floriano Peixoto, called especial attention to the necessity of remedying the situation. Nevertheless, a proposal in the same year to repeal this law was defeated.[1]

The decisions of the supreme court in regard to this question were like the line of decisions on so many other questions, for many years uncertain and vacillating, admitting as exceptions the simultaneous enjoyment of retiring allowances or pensions with salaries from active service, the simultaneous enjoyment of salaries from elective and appointive offices, the simultaneous enjoyment of remuneration from state and federal offices, and other exceptions established by legislative or executive decree. In 1919, however, the court finally adopted the position that the prohibition of the constitution was absolute and did not permit of these distinctions.[2] The new administration which came into office in November 1922 immediately addressed itself to the strict application of this view, there being still at that time many cases of double remuneration.

As chief of the nation the president has the duty and the corresponding power to see that the laws are faithfully executed and that internal order is preserved. To this end he is not merely head of the civil administration, but also commander-in-chief of the armed forces when employed in the internal defense of the Union as well as for its external defense. In the performance of this duty he is given the powerful weapons of intervention in the affairs of the states and the declaration of the state of siege, which have already been touched upon in their bearing on the relation between the states and the Union. It is true that in both of these extraordinary manifestations of power the collaboration of the legislative and judicial branches of the government may be required, but the primary duty rests upon the president, and his command of the military forces of the nation gives him alone the means of making the exercise of those powers effective. The frequent employment of both of these measures, usually with the entire acquiescence of the other two branches of the

[1] Barbalho, *op. cit.*, pp. 339, 340.
[2] Araujo Castro, *Manual da Constituição*, pp. 316–322.

government, is at once cause and effect of the important place occupied in the public mind by the chief executive.

In his relation with other countries the president stands out as representative of the nation. It is true that he can not declare war without the authorization of the congress, save in case of foreign invasion or aggression, nor can he conclude treaties without ratification of the same body. But he is the sole judge of whether such invasion or aggression has occurred, and his position of leadership renders unlikely the rejection of treaties negotiated by him. In the only war in which the republic of Brazil has taken part, the Great War, the president conferred with the committees on diplomacy of both houses and awaited their action in "recognizing and proclaiming the state of war initiated by the German empire" through the torpedoing of Brazilian merchant ships, though this constituted a case of foreign aggression, in the eyes of the leaders of Brazil, which would have justified the president in immediately declaring war himself.[1]

Finally, the president of Brazil enjoys the power to pardon or commute penalties with regard to the crimes subject to federal jurisdiction, save those relating to malfeasance in office, which can be pardoned only by the congress.

THE MINISTERS OF STATE.

One of the most striking differences between the constitution of Brazil and the model which it in general followed, that of the United States of America, is to be found in the attention devoted by the former to the positions which correspond to our heads of departments. In the United States, as is well known, the very existence of heads of national departments was only incidentally mentioned in the constitution and their exact position was nowhere clearly defined. In the constitution of Brazil, by contrast, there is a special chapter devoted to the ministers of state, and their place in the governmental system was fixed in considerable detail.

The explanation of this difference is to be found in the historical antecedents of the system established in Brazil upon the overthrow of the empire. Not only did the leading spirits in the republican movement in Brazil desire to substitute an elective president for a hereditary emperor and a federation for a highly centralized state, but they wished also to get rid of the parliamentary system which had developed in Brazil after about 1840. This parliamentary system was objectionable principally, it is true, because it was a sham. It appeared, on the face of it, to temper the monarchical principle with the democratic supremacy of the representatives chosen by the people. In reality, however, the monarch and his group of immediate advisers exercised an extremely personal government, assuring the support of

[1] See Prazeres, Otto, *O Brasil Na Guerra* (Rio de Janeiro, 1918).

the parliamentary majority by controlling the election process and permitting a ministry to be overthrown by a parliamentary vote only when the monarch himself was through with it.[1]

At the time when the task of framing a new constitution for republican federal Brazil was begun there had been in operation for a generation the government of the Third Republic in France, combining with the republican the parliamentary form, so that a similar combination in Brazil would not have been a step in the dark. Moreover, on the South-American continent, Chile had subjected the executive to the legislature. Both of these examples were well known to the leading statesmen of Brazil, but so far from inspiring a desire to continue the parliamentary feature in the new government the observation of its working in those two countries confirmed more strongly than ever the opinion that it should be abandoned in Brazil. It was denounced as unsuited to the republican *régime,* contrary to the principle of the separation and independence of governmental powers, incompatible with the federal system, and fatal to public administration.

While following, therefore, the example of the United States and adopting the presidential instead of the parliamentary system, it was necessary for the Brazilian constitution to establish the place of the ministers in clear and unmistakable terms; hence such provisions as that stipulating the free removal as well as the free appointment of the ministers of state by the president,[2] a feature that goes beyond the corresponding aspects of our own constitution; hence also the express prohibitions on ministers being members of either chamber of the legislature or appearing at the sessions of the congress;[3] hence also the express denial of responsibility of the ministers before the congress for advice tendered to the president.[4] Other provisions in the same sense designate the ministers as "agents of his confidence" and provide that their annual reports shall be directed to the president and then distributed to the members of the congress. Under these various provisions it is evident that the question which arose at various times in the United States as to the relative power of direction of the president and the congress with relation to heads of departments was answered at the outset in Brazil in favor of the former.

In one respect only does the Brazilian system seem to depart from the strictest conceptions of presidential government. The constitution provides that the ministers of state shall countersign the acts of the president. Such a provision, usually followed by the words,

[1] See Barbalho, *op. cit.*, pp. 200–203. For a detailed account of the origin, development, and defects of the parliamentary system in Brazil, see Freire, Felisbello, *Historia Constitucional da Republica*, Vol. I, Ch. III.

[2] Constitution of Brazil, art. 48, sec. 2.

[3] *Ibid.*, arts. 50 and 51.

[4] *Ibid.*, art. 52.

"thereby assuming responsibility therefor," is, it is true, commonly found in the fundamental laws of countries operating under the parliamentary form of government, and the equivalent is not encountered in our own constitution. On the other hand, the constitutions of other states which are obviously not operating under that form, *e. g.*, Argentina, convey the same idea and it is quite clear that they were in no sense intended to imply political responsibility in Brazil. Barbalho even contends that the ministers are not criminally responsible for the acts of the president which they countersign,[1] though Castro points out that such criminal responsibility is in no sense inconsistent with the principles of presidential government and that it makes the ministers no more subject to congressional control than does the power of impeaching the president himself, to be considered a little farther on.[2]

As regards the criminal liability of the ministers of state, the constitution provides that for ordinary crimes and official crimes they shall be tried and sentenced by the federal supreme court, but for crimes connected with those committed by the president they are to be tried and sentenced in accordance with the procedure established for impeachment of the president and vice-president and members of the federal supreme court.

The constitution stipulates that each minister of state shall preside over one of the ministries into which the federal administration may be divided. The determination of the number of departments is, therefore, left, in Brazil, as with us, to ordinary legislation, whereas the Argentine constitution fixed the number itself. By law of October 30, 1891, there were established six ministries, increased by law of April 29, 1906, to seven by the separate establishment of part of the jurisdiction of one department. These are as follows: finance; justice and internal affairs; transportation and public works; foreign relations; navy; war; agriculture, industry, and commerce. It is now proposed to increase the number still further by subdividing the last-named ministry and by the addition of others.

These ministers of state receive a salary fixed by law and amounting at present to 42:000$000 ($10,500 at exchange rate of 4$ to the $1). They are commonly chosen from the ranks of congress or of former members of congress, most of them having had previous administrative experience in the federal government or in their own state governments. Political and personal considerations play a large part in the selection of ministers but as a rule the minister has had special experience or shown special capacity in the field comprised within his ministry. Little or no attention is paid to geographical distribution

[1] *Op. cit.*, p. 209.
[2] Araujo Castro, *Manual da Constituição Brasileira*, pp. 130–133.

of these posts, as the complaints of the smaller or less advanced states evidence.[1]

The ministers of state have only an individual standing by the constitution and laws, that is, there is no recognition of a joint character as a ministry nor is the word cabinet employed with reference to them. In ordinary usage, however, they are jointly referred to as the ministry of the president, and they meet regularly with the president in weekly consultations, just like the "cabinet meetings" in the United States.

While the president himself acts through decrees (a term applied also to the acts of congress which relate to administrative measures not creating general rights or obligations), instructions, and regulations, the ministers expedite orders (*avisos*), instructions, and determinations (*portarias*) in addition to ordinary memoranda (*officios*) circulars, and findings (*despachos*). The ministerial orders (*avisos*) are published annually under the designation *Decisões do Governo*. Being accorded by the Brazilian practice a much larger degree of freedom in the application of laws, the ministers enjoy a correspondingly greater influence than do our national secretaries, whose functions as administrative heads of departments are perhaps overshadowed by their functions as political advisers and agents of the president.

THE RESPONSIBILITY OF THE PRESIDENT.

While it was the clear intent of the Brazilian constitution to constitute an executive power the head of which should in truth be the elective chief of the nation, consciously and expressly casting aside the parliamentary form of government, it was not intended to create, even in an elective office of relatively short duration and without possibility of immediate reëlection, an official above and beyond the law. The constitution, therefore, expressly established the responsibility of the president in a special chapter, which while based on the impeachment process found in our fundamental law was more specific and elaborate with regard to that process.

The constitution distinguishes two classes of cases or crimes for which the president may be tried and sentenced, ordinary crimes and official crimes. In either case the indictment or accusation must be brought by the chamber of deputies. But in the case of ordinary

[1] Taking the ministers appointed by President Bernardes, in November 1922, as an illustration, the following facts are of interest: The posts of minister of war and of the navy were filled by high officials of those two services. This was for many years the uniform practice, but President Pessoa abandoned it by appointing civilians to these posts. The change was generally approved as tending to reduce the political rôle played by the military element in Brazil, always prominent and sometimes predominant. Owing to the peculiar circumstances surrounding the presidential campaign of Bernardes, who was accused of affronting the dignity of the army, it seemed best to return to the former practice with regard to these two posts. Of the other five ministers of state appointed by President Bernardes, two were members of the chamber of deputies, two were members of the senate, and one had been a cabinet minister of Bernardes while the latter was president of the state of Minas Geraes. Geographically, these five ministers represented five different states of the Union.

crimes the trial is before the supreme court, while in the case of official crimes it is before the senate. In either case, however, the indictment or impeachment by the chamber of deputies results in the suspension of the president from office.

This last provision, which is not found in the constitution of the United States, was contained in the original draft of the commission of five, but was omitted in the instrument promulgated by the provisional government. The committee of 21 of the constituent congress, however, reinserted it among the amendments approved by it, without comment either in its report or in the discussion of the same, and the congress itself adopted it likewise without discussion, with the result, as Barbalho points out, that a simple vote of a majority of the chamber could suspend the president from his functions.

The constitution itself defines as official crimes acts of the president which constitute an attack (1) on the political existence of the Union; (2) on the constitution and the form of the federal government; (3) on the free exercise of the governmental powers; (4) on the enjoyment or legitimate exercise of political or individual rights; (5) on the internal security of the country; (6) on the probity of the administration; (7) on the constitutional care and use of public moneys; (8) on the budget laws voted by the congress. It then goes on to provide that these crimes shall be defined in a special act and that another law shall regulate the impeachment, the process, and the sentence.

These two laws were passed in the first session of the congress,[1] defining the crimes more minutely and providing that they might be punished either by loss of office alone or also by loss of the right to hold any other office without prejudice of actions by the ordinary judicial process against the one convicted (art. 33, sec. 3, of the constitution). They also made the president liable as accomplice as well as principal and stipulated that such action can only be brought while the accused is in the exercise of his office.

In May of 1893, a charge was brought against the vice-president of the republic, Peixoto, then in the exercise of the presidency. The special committee appointed to examine the charges and the documents submitted consisted of five supporters of the government and four opponents. It brought in a report, accompanied by a dissenting report of the minority, in which it held that the charges were not a matter for their deliberation, asserting that before proceeding to the examination of the judicial question involved, as to whether or not there were grounds for proceeding with a trial, the chamber of deputies must decide the question as a sovereign and exclusively political tribunal, without being obliged to make any prior inquiry, as to whether the charges are or are not matters for their deliberation.

[1] Laws Nos. 28 and 27, of January 8 and 7, 1892, respectively.

The chamber of deputies acted on the majority report on purely political grounds, or else they had desired to close their eyes to the evidence or ignored the provision of the law which declared that for the purpose of proceeding with the impeachment it was enough for the accuser to submit documents that led to the belief of the existence of the crime.[1]

This single experience proves clearly enough what is generally recognized, viz, that the impeachment process is essentially a political, not a judicial, proceeding, in spite of the safeguards that may be put around it by law. For that reason it is even less likely to be used in a country like Brazil, where the president normally has a larger supporting majority in the chamber of deputies than with us, where a change of party alignment might leave a president with a hostile majority in the lower house.

A curious omission in the Brazilian constitution leaves the vice-president out of the impeachment process and does not even accord him the immunity enjoyed by senators and deputies, for although he is president of the senate he is not a member of the same. In 1898 the vice-president was haled before the courts on charges regarded by them as alleging ordinary, not official, crimes. The accused pleaded his privileged position, which the court denied, though adjudging him innocent of the charges brought.[2]

Aside from the power of impeachment, which is almost *nil* as a practical measure of control, the power which the congress exercises over the purse, and the negative power that comes from refusing to enact desired laws, not forgetting the function of the congress in canvassing the popular vote for president and, in case of no absolute majority, electing him directly, there are two more points at which the president is touched by the congress. His salary is fixed by the latter, though in the preceding presidential period, and he may not leave the national territory without the permission of the congress. The former is fixed at 120:000$000, with 265:000$000 for expenses of his residence (about $100,000 in all). The second provision is not found in our constitution and has not been implied from it, but is quite common among Latin-American constitutions. It was already found in Brazil in the constitution of the empire and was contained in all the preliminary drafts. The effect of his violating this prohibition, applied also to the vice-president, is the same as a resignation.

[1] See Barbalho, *op. cit.*, pp. 213, 214.
[2] *Ibid.*, pp. 212, 213.

CHAPTER V.

THE FEDERAL JUDICIARY.

In the discussion of the federal basis of the Brazilian system, a brief summary was made of the rôle played by the federal judiciary in the determination of the relations between the states and the Union. In this chapter the organization and jurisdiction of the federal courts will be considered in relation to the other organs of the national government.

It has been seen that the constitution of Brazil leaves no doubt on the subject of the jurisdiction of the federal courts to pass upon the validity of state legislative or executive acts in relation to the federal constitution and laws, by according to the federal supreme court the jurisdiction of reviewing decisions of the highest state courts sustaining the validity of such acts when attacked as invalid.[1]

In the same section express recognition is given to the power of the courts to pass upon the validity of federal laws and treaties. While the Constitution of Brazil does not, as do some other Latin-American constitutions, give to the federal courts the power "to decide whether the federal executive or legislative acts may or may not be applied, in cases that come before them, because of conflict with the constitution," it does say that the supreme court shall have jurisdiction to review the decisions of the highest state courts in cases where the validity or application of federal treaties and laws is attacked and the decision of such state court is contrary thereto, thus recognizing the power of passing on such validity not merely in the federal supreme court in the last instance, but even in the inferior state courts. Moreover, by article 60, the constitution enumerates among the cases which fall within the federal judicial power those in which either of the parties bases its action or defense on provisions of the federal constitution.

Quite apart, however, from any explicit recognition of this power in the constitution, it is clear that our American constitutional practice, firmly established and recognized since the famous case of *Marbury vs. Madison* in 1803, and thoroughly familiar to Brazilian publicists, was intended to be incorporated into the Brazilian system. Both of the provisions referred to above were incorporated into the draft constitution of the provisional government, not being included in the draft of the commission of five. As has been pointed out before, the moving spirit in the revision of this first project by the provisional government was Ruy Barbosa, who was both a profound

[1] Constitution of Brazil, art. 59, sec. 1, *b*.

student and a profound admirer of the North American system. It is appropriate, therefore, that the classic exposition of this matter should have been made by him early in the history of the new republic. In view of its recognized authority and because it summarizes so well the Brazilian application of the doctrines developed on this important matter in the United States, it is worthy of brief reference.

The matter is presented in an argument relating to the case of federal military and civil officers dismissed by executive decrees of April 7 and 12, 1892, in violation, as Barbosa claimed, of rights guaranteed by the constitution.[1] Only the summarized conclusions can be reproduced here so far as they relate to this question of the power to declare acts unconstitutional. They are, as will be seen, but restatements of the well-known doctrines of our supreme court and commentators:

> The federal courts have the power to declare null and void legislative acts that violate the federal constitution. This declaration, when properly invoked, is not merely a legal right of the federal courts but also an inescapable duty. The nullity of the unconstitutional acts of the executive power, like that of those of the legislative, and with even more reason, is fixed by means of judicial action. The inapplicability of the unconstitutional legislative or executive act is determined with reference to each particular case by a judgment rendered in a suit duly instituted and capable of execution as between the parties. The violation of individual guaranties, practised under the guise of political functions, is not immune from the action of the courts. These must in all cases determine whether the political power invoked as withdrawing the case from the jurisdiction of the courts includes within its limits the exercise of power in question.

From the earliest days of the Brazilian federation, therefore, it has been a fundamental precept of the constitution that the power to pass upon the constitutionality of acts of the national legislative or executive power resides in the courts. In the working out of this doctrine, moreover, the principles followed by our supreme court tending to restrict as far as possible the exercise of this power have also been applied. When it is recalled that in the United States there were only thirty-three cases up to 1911 in which federal statutes had been declared invalid,[2] or on an average of one every three years in the interval between 1803 and 1911, it is not surprising that there should have been few instances of the exercise of this power in the thirty years since it was first invoked in Brazil, especially as it was an institution wholly foreign to the system of law and government which preceded the federal republican government.[3]

One difference between the Brazilian system and ours may be noted at the outset, a difference that flows from the fundamental

[1] Published under the title *Os Actos Inconstitucionaes do Congresso e do Executivo ante a Justiça Federal* (Rio de Janeiro, 1893).

[2] Kimball, Everett, *The National Government of the United States*, p. 410.

[3] For a list of recent cases illustrating the exercise of this power see Appendix No. 3.

fact, already considered in an earlier chapter, that in Brazil the whole field of commercial, civil, and criminal substantive law falls within the jurisdiction of the federal government. In the United States of America, where that field has been left in much the largest part to the individual states, the judiciary article of the federal constitution extends the federal judicial power to all cases arising under the constitution, treaties, and laws of the United States. In Brazil, where the whole field of substantive legislation, save that of administrative law, has been accorded to the Union, such an extensive judicial jurisdiction could not be given to the federation without practically destroying the jurisdiction of the state courts. Hence the Brazilian constitution, in article 60, *a*, enumerates only cases in which either of the parties rests its position on provisions of the federal constitution. Furthermore, such invocation of the constitution must be immediate and exclusive if the federal courts are to have original jurisdiction. If other considerations are invoked as well, the original jurisdiction rests with the state courts, on the general principle that their jurisdiction extends to all cases not expressly assigned to the jurisdiction of the federal courts.[1]

Another difference, of even more fundamental importance, between the Brazilian system and our own, in relation to this matter of judicial interpretation of the constitution and its application to the question of the enforcement of legislative and judicial acts, flows from a basic difference in the attitude of the court towards its own earlier decisions. Under the Anglo-Saxon principle of *stare decisis,* exalted by our American courts since the earliest days of our history, flat reversals of decisions, though by no means unknown, are avoided by the courts whenever possible and have been relatively rare, especially in the matter of constitutional interpretations. In Brazil, on the other hand, the continental European system has in general been followed, which is much more inclined to go anew into each case on its own merits, even though the exact point may have been settled in a relatively recent decision. This system avoids the rigidity which characterizes our public law, especially in view of the relative difficulty of amending our constitutions when a judicial decision has interpreted them in such a way as to make amendment desirable. On the other hand, it has the obvious defect of making the law uncertain even with regard to the most fundmental matters of constitutional relations. So frequent have been the instances of conflicting decisions and reversals by the supreme court of Brazil that many of the Brazilian jurists have commented on it adversely. So Pedro Lessa, among the greatest of Brazilian lawyers and himself a member of the supreme court, wrote in

[1] See the standard treatise on the federal judicial power, Pedro Lessa, *Do Poder Judiciario* (Rio de Janeiro, 1915), pp. 129 ff.

1915, in discussing the important question of the liability of the government in suit:

> In this matter, as in many others, our jurisprudence is still inconsistent, uncertain, variable, for which reason it would be of little use to refer to some of the decisions.[1]

Under these conditions a discussion of a constitutional point in Brazil, whether in an article, a book, or even in the opinion of a supreme court justice himself in the decision of a case, is quite as likely, if, indeed, not more likely, to refer to the opinion of constitutional lawyers in the United States, the Argentine, or Brazil as to prior decisions of the supreme court of Brazil involving that very point. Some conception of the practical significance of this state of affairs can be gathered from the fact that a prominent Brazilian jurist has advanced the view that the president of the republic would scarcely be justified in refusing to enforce a law as unconstitutional if there had been merely one supreme court decision declaring it to be such.

One other point may be noted here in reference to the function of the federal judiciary in passing on the constitutionality of legislative or executive acts of the other branches of the national government. It is an accepted principle of Brazilian constitutional law, already enunciated in the argument of Ruy Barbosa, presented early in 1892,[2] and based on our own constitutional practice, that political acts of the legislative or executive branches of the government are not subject to review by the judicial branch. It is not enough, however, that such a question merely presents some political aspects or may be susceptible of political consequences. It is necessary that it be simply, purely, and merely political.[3] Ruy Barbosa in another argument which has become a classic exposition of many constitutional doctrines in Brazil,[4] after an exhaustive examination of American authorities, enumerates as questions of an exclusively political nature, without excluding others that might possibly fall under this head, the following: the declaration of war and the making of peace; the conduct and direction of diplomatic relations; the acceptance of credentials of representatives of foreign governments; the conclusion and ratification of treaties; the recognition of the independence, sovereignty, and government of other countries; the determination of the national boundaries with neighboring states; the control of international commerce; the command and disposal of the military forces; the calling out and mobilization of the militia; the recognition of the legitimate government in the states when claimed by opposing parties; the securing of the republican form of government in the states decreed by the constitution; the determination of the relations

[1] Pedro Lessa, *op. cit.*, p. 169.
[2] See p. 107.
[3] Pedro Lessa, *op. cit.*, p. 59.
[4] *O Direito do Amazonas ao Acre Septentrional.*

between the Union or the states and the Indian tribes; the system of taxation; the adoption of protective tariff measures; the distribution of expenditures under the budget; the admission of a state to the Union; the declaration of the existence of a state of insurrection; the reëstablishment of peace in the rebellious states and their reintegration in the federal system; the filling of federal offices; the exercise of the executive sanction or veto of congressional acts; the calling in extra session of the national congress.[1]

All these questions referred to in specified provisions of the Brazilian constitution have one thing in common: They all have in mind the question of expediency or convenience, whether transitory or permanent, but always of a general nature. They are matters of common interest, public utility, national necessity or advantage, necessitating an authority, more or less arbitrary, subordinated to the jurisdiction of those who exercise it, subject to the check of popular opinion and social morality, but autonomous within a vast sphere of action within which the legislator and the administrator freely move. This is the purely political field forbidden as such to the interference of the courts. In contrast with this there is the field of the judiciary, with clear and evident limits distinguished exactly by the opposite character of the questions lying within its domain, which, instead of resting on questions of convenience more or less general, deal with the application of legal rights to particular cases, individual or collective. Wherever a juridical problem of this nature arises, even though it be not devoid of political elements, since it is no longer a purely political question, it must receive its legal solution from the power constituted to give effect to the constitutional guaranties, and make them effective for every individual, natural or moral, injured in his rights.[2]

This masterly exposition did not prevent the supreme court from issuing, in January 1923, a writ intended to secure a state president in the assumption of his office, even though the validity of his election was challenged and even though the president of the republic had sent a message to the congress submitting to its judgment the advisability of intervening in the case. But this was contrary to its general practice, which, on the whole, has been perhaps too much inclined to keep hands off these questions, even though the violation of individual rights was alleged, for the very practical, if not juristically sound, reason that it does not in the last analysis have the material power to enforce its own will in case of conflict with the executive.

Of the general jurisdiction of the federal judiciary other than that of passing on the constitutionality of the acts of the other branches of the national government and of having the ultimate say with

[1] Quoted in Pedro Lessa, *op. cit.*, pp. 61, 62.

[2] *Ibid.*, pp. 62, 63.

regard to the adverse interpretation of the state courts on such acts or the favorable interpretation of state acts alleged to violate federal legal or constitutional provisions, it is possible to speak only very briefly, though some of the mooted questions are of great interest.

The jurisdiction of the federal supreme court is defined as original and exclusive in Part I of article 59, and comprises (*a*) the trial of the president for ordinary crimes and of the ministers of state for these and for official crimes not connected with those of the president; (*b*) diplomatic ministers for both ordinary and official crimes; (*c*) suits and conflicts between the Union and the states or between these latter one with another; (*d*) litigation and claims between foreign nations and the Union or the states; (*e*) conflicts between the judges or federal courts with each other or with those of the states, as well as those of the judges or courts of one state with those of another.

In accordance with our constitutional theory, the original jurisdiction of the supreme court, further qualified in the Brazilian instrument by the term exclusive, is incapable of either expansion or contraction by any other process than that of amending the constitution, a theory which has been acknowledged by the Brazilian jurists and applied by the supreme court itself.[1] Nevertheless, subsequent laws, especially law No. 221, of November 20, 1894, have enlarged the original jurisdiction of the supreme court to include cases of the trial of justices of the court itself for ordinary crimes, the official crimes of the lower federal judges and their alternates and substitutes, the trial of the judges of the court of accounts for official crimes, the attesting of the judgments and sentences of foreign courts to make them enforceable in Brazil, the requests for extradition, the issuance of the writ of *habeas corpus* in certain enumerated cases, and the trial of state presidents or governors for official crimes against the free exercise of political rights.[2]

The supreme court in a decision rendered in 1916 pronounced the provisions of the law of November 20, 1894, relating to the issuance of the writ of *habeas corpus,* as in large part inapplicable because unconstitutional, restricting its original jurisdiction to entertain petitions for the issuance of that writ to three cases.[3] But none the less clear is the unconstitutionality of the provisions extending the original jurisdiction of the supreme court to the trial of the state presidents, to that of the members of the supreme court for ordinary

[1] See Barbalho, *op. cit.*, p. 235.

[2] Araujo Castro, *Manual da Constituição*, pp. 150, 151.

[3] (1) When it is sought against an act of coercion by a federal district judge; (2) when by reason of the imminence of the danger of the coercion being suffered before another judge can pass on the matter the supreme court must act in the case to prevent the violation of the constitutional guaranty against illegal exercise of authority; and (3) when the coercion emanates from authorities whose acts are immediately subject to the jurisdiction of the supreme court. (Decision No. 3,969, cited in Araujo Castro, *op. cit.*, p. 151, n. 1.)

crimes, and to that of the members of the court of accounts for official crimes. The original jurisdiction conferred by law in regard to the attesting of the judgments of foreign courts and to the extradition trials has been justified as falling under that paragraph of this article which relates to litigations and claims between foreign nations and the Union or its states.

After defining the original and exclusive jurisdiction of the supreme court, the constitution defines its appellate jurisdiction. But here there is a difference to be noted between the provisions of the Brazilian constitution and of our own on that point, which has given rise to a great deal of controversy among Brazilian jurists. The judiciary article of our constitution, in defining the appellate jurisdiction of the supreme court, adds: "with such exceptions and under such regulations as the congress shall make."[1] Therefore, in the exercise of its power to establish inferior courts, the congress of the United States could undoubtedly create courts of second or even third instance below the supreme court and entrust appellate jurisdiction to them. In Brazil, however, the article in question expressly states that it shall be part of the judicial power of the supreme court to settle on appeal the matters decided by the federal judges and courts, as well as those mentioned in section 1 of article 59 and those in article 61.

Owing to the increasing congestion in the federal supreme court, it has been proposed at various times to establish regional courts with original and appellate jurisdiction, final in certain cases. This proposal, though supported by many jurists as both necessary and constitutional, has generally been regarded as in violation of the constitution, which entrusts appellate jurisdiction to the supreme court.[2] In 1916 the federal senate adopted an amendment to bill No. 77 of the chamber of deputies by which such regional courts were created. The amendment was rejected after much discussion in the chamber, and on June 9, 1920, the supreme court adopted an amendment to its own rules of procedure declaring that its jurisdiction was to judge in second and last instance "as the only court of appeal in the federal judiciary."[3] Equally inapplicable, on grounds of unconstitutionality also, would be the remedy proposed to divide the supreme court into sections, since the number of judges is fixed by the constitution and questions can only be decided when a majority of that number is present. The conclusion of Araujo Castro would seem, therefore, to be sound, that while the creation of regional courts of appeal is a necessity, such a measure would require a constitutional amendment.

The paragraph of article 59, defining the appellate jurisdiction of the supreme court, mentions, besides the cases decided by federal

[1] Constitution of the United States, Art. III, sec. 2, par. 2.
[2] Pedro Lessa, *op. cit.*, pp. 80–85, and Castro, *op. cit.*, pp. 388–391.
[3] Araujo Castro, *op. cit.*, pp. 388–401.

judges or courts, and those relating to cases decided by the state courts involving the validity of federal laws or treaties or of state acts in the face of the federal constitution and laws, also those named in article 60. This last is a clear error and should have read article 61, for article 60 relates to the jurisdiction of the federal courts already covered by the first class of cases mentioned by the paragraph in question, whereas article 61 relates to another class of cases which are expressly subjected to the appellate jurisdiction of the supreme court and should properly have been mentioned in the paragraph under consideration. The error was due to a mere oversight, for article 61 in the constitution was numbered article 60 in the draft constitution of the provisional government which was under consideration by the constituent congress. The provisions relating to the jurisdiction of the federal courts were taken over almost without change into the new constitution and the committee on revision simply failed to alter this reference.

Of the appellate jurisdiction of the supreme court with regard to cases involving the interpretation by state courts of the federal constitution or laws or treaties, it is not necessary to say much more here. This is known as the "extraordinary appeal" (*recurso extraordinario*), in contrast with the ordinary appeal, which occurs when cases are taken from a lower to a higher instance in the same set of courts.[1] It corresponds in essence to the writ of error which lies from the decisions of our state courts of last instance to the United States supreme court. It should only be invoked when the case has passed through the state court of last instance, though sometimes the supreme court has failed to insist on that point. Obviously, since the whole domain of substantive civil, criminal, and commercial law is in Brazil part of the federal legislative jurisdiction, many more cases will arise than with us in which state courts will pass upon the interpretation or application of such laws. But the mere interpretation or application of civil, criminal, or commercial law will not suffice to grant a right of appeal. It is admitted only when the local courts declare the federal law inapplicable or fail tacitly to apply it, not when the local court applies the federal law in one sense or another.[2] But any interpretation by the state courts of the federal constitution will give the right of appeal. Decrees of the federal executive stand on the same basis as laws if relating to substantive law, not merely adjective or procedural law.

Article 61 of the constitution relates to another kind of appeal, known as the *recurso voluntario*. This lies to the supreme court from the decisions of the state courts in cases that fall within their jurisdiction when relating to the writ of *habeas corpus* or to the estates of foreigners in cases not covered by treaty or convention. The writ of

[1] Pedro Lessa, *op. cit.* [2] Araujo Castro, *op. cit.*, p. 154.

habeas corpus, which can issue either from the state courts or from the inferior federal courts, or from the supreme court itself, is one of the most important safeguards of the individual in Brazil and plays a much more important rôle than does the same writ with us. But a detailed consideration of its character fits in better with a discussion of the constitutional guaranties than with a survey of the federal judicial organization and jurisdiction. It is to be noted here, however, that the appeal from the state courts to the supreme court in cases of *habeas corpus* lies only when the writ is denied by the lower court.

In addition to these cases of appeal to the federal supreme court, the constitution also gives a right of review in all criminal cases at any time in the interest of the convicted.[1] The right to this review may be invoked by the defendant, by any other individual, or ex-officio by the attorney-general of the republic. But in the revision of the sentence the penalties imposed in the lower court may not be aggravated. The right to this review applies also to military prosecutions. The constitution leaves to the determination of ordinary laws the cases and the form of this revision. It is applicable in the following cases: (*a*) when the judgment was contrary to the express provisions of the penal law; (*b*) when the essential formalities were not observed in the trial; (*c*) when the conviction and sentence were pronounced by a judge who was incompetent, under suspicion of interest, bribed or suborned, or when the judgment was based on a false deposition, instrument, or other evidence; (*d*) when the judgment was in formal contradiction with another, by which others were sentenced as principals in the same crime; (*e*) when the sentence was imposed for supposed homicide and the person believed killed proves to be alive; (*f*) when the sentence was contrary to the evidence; (*g*) when, after conviction, new and unimpeachable evidence of the innocence of the condemned is discovered.[2]

In paragraph (*d*) of article 60, which defines the federal judicial power, are mentioned suits between a state and citizens of another state, or between citizens of different states when the laws of these differ. This last clause is a curious provision, since the constitution itself assigns to the federal legislative power the whole field of substantive civil, criminal, and commercial law. Consequently, there would be no instance of a difference in the laws of the states, except as regards procedure, and diversity of citizenship would not give the federal courts jurisdiction. But Barbalho points out[3] that this last clause was left in by mistake after the effort to establish a duality of legislation as well as of courts was defeated. He contends, and his point of view has been followed by later commentators and adopted

[1] Constitution of Brazil, art. 81.
[2] Araujo Castro, *op. cit.*, p. 156.
[3] *Op. cit.*, pp. 252, 253.

by the federal supreme court, that this limitation is to be ignored and that diversity of citizenship always enables the case to be brought in the federal courts. The term citizen for the purpose of this article is equivalent to resident, and includes legal as well as natural persons. Criminal prosecutions are not included under this head, nor are proceedings in bankruptcy, neither of these cases being suits within the meaning of the term as here employed.[1] As regards the matter of bankruptcy proceedings in general, there has been in Brazil the greatest confusion, both among commentators and in the decisions of the supreme court, the latter having held in various cases up to 1919 that the state courts and not the federal courts had jurisdiction. By a decision in that year, however, the court reversed its position and held that bankruptcy proceedings in which the federal government is an interested party come within the terms of paragraph (*c*) of this article, which speaks of cases instituted by the government of the Union against individuals, or vice versa.

Although the trial of criminal cases in general falls within the jurisdiction of the state courts, express exception is made in the case of political crimes. This provision has been the subject of considerable controversy among Brazilian jurists and of vacillating interpretation by the supreme court and the congress. It is of considerable importance in the relation between the states and the Union. The federal supreme court first held in various cases that crimes against the government and authorities of the states and their administrative subdivisions were not covered by this provision of the constitution giving the federal courts jurisdiction over political crimes. In the same sense the national congress by the supplementary judiciary act of 1894[2] provided that such crimes against the states did not fall within the jurisdiction of the federal judiciary, except in the case when such crimes were the cause or the consequence of disturbances that involve the armed intervention of the federal government in accordance with article 6 of the constitution. But by a later law of 1908,[3] this provision was expressly repealed, and since that time the supreme court has consistently asserted the jurisdiction of the federal courts to try political crimes not only against the federation but also against the states or their municipalities, as well as ordinary crimes connected with such political crimes.[4]

As to the question of what crimes fall within the category of political crimes, the matter is not so clearly settled. The penal code in Book II enumerates a number of crimes which, though not classified as such in the code itself, have been held to constitute political crimes

[1] Pedro Lessa, *op. cit.*, p. 188. Araujo Castro, *op. cit.*, pp. 162, 163.
[2] Law No. 221, of November 20, 1894, art. 83.
[3] Law No. 1,939, of August 28, 1908, art. 4.
[4] For a fuller discussion of this important question of federal jurisdiction, see Pedro Lessa, *Do Poder Judiciario*, pp. 246–256, and the references there given.

within the meaning of this provision. In general, crimes against the political organization and against the political rights of the citizens fall within this category, including also acts which are ordinary crimes but which by reason of their purpose are of a political nature. Curiously enough, however, assassinations and destruction of property practised by anarchists are not considered as political crimes, and these fall, therefore, in accordance with the general constitutional theory of the division of jurisdiction between the Union and the states, within the jurisdiction of the state courts. In the history of this provision we have another interesting illustration of the expansion of federal jurisdiction by legislative and judicial interpretation of the constitution, although the history of the origin of this provision seems to show that the provisional government which inserted it in the draft constitution intended to give the federal government a comprehensive power of judging all such crimes.[1] It is unnecessary to point out that no similar provision exists in our constitution.

ORGANIZATION OF THE FEDERAL JUDICIARY.

The constitution provides that the judicial power of the Union shall be exercised by a federal supreme court, located in the capital of the republic, and by such federal judges and tribunals, distributed throughout the land, as the congress may create. Federal judges are to hold office for life and can be deprived of their office only by judicial sentence, the senate trying the judges of the supreme court for official crimes and the supreme court itself trying the lower federal judges. The remuneration of the judges is determined by law and may not be diminished. The federal courts are to elect from among their members their own presidents and shall organize their own secretariats, appointing and dismissing the employees of the same, as well as filling the other judicial offices within their respective jurisdictions by acts of the presidents.

The federal supreme court is to consist of fifteen judges appointed by the president of the republic, with ratification by the senate, from among citizens of well-known learning and reputation, having the qualifications requisite for election to the senate.[2] The two most striking departures from the American model in this respect are to be found in the determination of the number of judges and in the qualifications established for the office of members of the supreme court.

In fixing a definite number of judges for the supreme court instead of leaving that to the determination of congress, as was done in the United States of America, the constitution of Brazil avoided the possibility of abuse of this power by the congress for political purposes, an abuse the occurrence of which in the United States, notably at

[1] See Barbalho, *op. cit.*, pp. 255–259.

[2] Constitution of Brazil, art. 56.

the time of the controversy with Andrew Johnson, was entirely familiar to Brazilian students of our constitutional system.[1] The draft of the commission of five had also fixed the number of supreme court judges at fifteen, though stipulating that they should be appointed by the senate. The large number of judges prescribed was doubtless dictated by the judicial organization of the empire, under which the number of judges of the supreme court was seventeen.[2]

The requirement that members of the supreme court must possess the qualifications requisite for election to the federal senate was established by the draft constitution of the provisional government and reproduced a provision of the Argentine constitution. The further Brazilian requirement that the persons appointed to this office must be citizens of well-known wisdom and reputation was, however, much more indefinite as a qualification than the Argentine requirement that they be lawyers of eight years' practice in the federal courts. This limitation would appear to be so indefinite and elastic as to be practically worthless, and yet it has already been given effect. When in 1894 a famous physician and two distinguished generals were nominated by the president for the supreme court, the senate refused to confirm the nominations, on the ground that this "well-known wisdom and reputation" refers to the field of knowledge with which the functions of the supreme court are concerned.[3] It is not considered necessary that the nominee possess an academic degree, nor will the possession of a law degree itself suffice to prove the possession of the high degree of professional ability required for the post.

As a matter of fact, the roster of the Brazilian supreme court contains, or has contained, the names of the most eminent of the jurists of that land. (The salary is small, compared with what could be earned in private practice,[4] and the labor is considerable, but the post is one of great dignity and much sought after.) The supreme court was governed at first by the procedure regulating the supreme court under the empire, but subsequently it adopted new rules in accordance with the federal code and its own internal regulations. (The president of the supreme court, as also a vice-president, is elected for a period of three years by the court itself and enjoys a large administrative power, appointing and removing the members of the secretarial force, comprising more than forty employees, and granting leaves of absence to the subordinate federal judges and their substitutes.)

The court renders judgments (*accórdãos*) by majority vote, one member being designated to bring in the decision as *relator*, and the members giving their opinions individually (*votos*) with or without

[1] See the discussion of this article by Barbalho, a member of the constituent convention, *op. cit.*, p. 230.

[2] Rodrigues, *Constituição Politica do Imperio do Brasil*, p. 254.

[3] Barbalho, *op. cit.*, pp. 230, 231.

[4] 39:000$000 a year, the equivalent, at normal exchange rates, of about $10,000.

explanations. As with us, the justices may and frequently do concur in the judgments, but base their findings on different grounds, so that it is frequently difficult to say just what the opinion of the court may be.

Of special interest in Brazil is the office of *procurador geral,* a position for which there is no exact counterpart in our judicial organization and therefore no exact English term, though attorney-general is the nearest approximation. Briefly stated, his function is that of promotor of the interests and protector of the rights of the Union, organ and representative of the federal government, *i.e.,* the administration, before the courts. The constitution stipulates that the president of the republic shall designate this officer from among the members of the supreme court, leaving to ordinary legislation the determination of his functions.

As Pedro Lessa points out, "In the midst of the ancient and well-known difference of opinion concerning the question whether the representative of the public interests (*ministerio publico*) before the courts should be chosen from among the members of such courts or from among other citizens, the constituent congress chose the former solution."[1] As a matter of fact, this was a question which had already been settled in this sense by decree No. 848 of the provisional government, of October 11, 1890, organizing the federal judiciary in accordance with the provisions of the draft constitution prepared by the same authorities. Barbalho approves the solution adopted, as assuring both requisite competence in this office and harmonious working with the supreme court. But Pedro Lessa, himself for years a justice of the supreme court and the most authoritative of the writers on the judicial power, takes just the opposite view, on the ground that serious and manifest inconveniences flow from this arrangement. "For," he says, "the attorney-general not infrequently finds himself obliged to defend acts of the government which have no basis in the laws or in considerations of justice; later as judge he must either repudiate the views he held as advocate, and this produces a situation of manifest constraint, or in order to maintain consistency he decides in conformity with his arguments, which is obviously an even greater evil."[2]

The duties of the *procurador geral* are many and varied and rest in part on laws, in part on executive decrees, and in part on rules of the supreme court itself.[3] He may take part in the discussion of all matters submitted to the supreme court, but may vote only on such as are not matters of judicial judgment or decision. Originally, the law provided that the justice appointed to this office should hold it for life; but this feature was repealed by later legislation, which makes all the members of this branch of the public service subject to re-

[1] *Op. cit.*, p. 39. [2] *Op. cit.*, pp. 39 and 40. [3] *Ibid.*, pp. 40–42.

moval.[1] Aside from acting as the agent of the executive power in seeing that the laws are obeyed, the attorney-general's office watches over everything that concerns the general order, the public property of the Union, and its finances, as well as the rights of those unable to defend themselves. In a broad sense, the function of this *ministerio publico* is to protect in every possible way the interests of the general public as distinguished from private rights.

The constitution, as has been pointed out, left to the process of ordinary legislation the determination of the number and the organization of federal courts other than the supreme court, except as regards the manner of appointment and removal of these judges. But in this regard also, as in most of the fundamental questions relating to the judicial organization, the provisional government had already elaborated, by decree No. 848, the stipulations of the draft constitution promulgated by the same government on June 22, 1890. Not only did the constituent convention, upon meeting in November, 1890, have a constitutional project before it which established in detail the organization of the judicial power, but it was confronted also with the fact that an elaborate governmental decree covering the matters left by the constitution to ordinary legislation had already been put into force.

By this decree of October 11, 1890, the basis was laid for the entire judicial organization of the federal government, a basis which has not been very materially altered by subsequent legislation. By law of November 20, 1894 (law No. 221), the original decree was supplemented and completed, and in accordance with the provisions of that law a codification was made of all the existing laws bearing on the federal judicial organization and procedure, and promulgated as decree No. 3,084, of November 5, 1898, which forms the legal basis of the present organization, identical in most fundamental respects with the first decree of the provisional government.

The original measure in question provided that each state, as also the federal district, should constitute a judicial section or district with a single judge holding court at the state capital, thus continuing the organization of the lower judiciary in the provinces under the empire. Reference has already been made to the great diversity of opinion that existed among the members of the constituent congress with regard to the question of judicial organization, some wishing to limit the federal courts to a single supreme tribunal, such as was established in the German federation, others desiring to establish a complete hierarchy of federal courts, leaving to the states merely the organization of the lowest courts of first instance. But with the failure of the sundry amendments introduced with a view to changing the system as established by the draft constitution and the decree of October 11,

[1] Decree No. 280, of July 29, 1895.

1890, not only did the plan of having merely one set of courts below the supreme court meet with acceptance, but, as has already been pointed out, it has been interpreted to exclude the possibility of establishing an intermediate set of courts, with appellate jurisdiction, between these lowest courts and the supreme court.[1]

The sectional or district federal judges are appointed, in accordance with article 48, section 11, of the constitution, by the president of the republic, upon nomination of the supreme court. The latter may submit not more than three names, from which the president must make the selection. When a vacancy occurs in a federal judgeship, the president of the supreme court fixes a term of thirty days within which candidates for the position must file their petitions, accompanied by the requisite proofs of their qualifications. The constitution establishes no legal qualifications for these posts, as it does with regard to judges of the supreme court, but, in accordance with the earliest decree, the candidates must have been admitted to practice and must have either practised or served as judges for at least four years. The draft constitution of the provisional government had entrusted the appointing power of the inferior federal judges to the president alone; but the constituent congress, with a view to reducing the possibility of appointments for political reasons (more or less notorious cases, or alleged cases, of which abuse had occurred more than once in the United States), adopted amendments limiting this power of appointment, first by requiring ratification of appointments by the supreme court, but subsequently by putting the nominating power in the hands of the latter and the appointing power in the hands of the president. In order to avoid making the nominating power of the court equivalent to appointment, the law required that the court should submit more than one name for each vacancy, as previously noted.

This method of selecting the inferior federal judges obviously makes difficult the injection of political considerations by the president, though he is not bound to appoint any of those first named by the court, if in his opinion they do not meet the requirements of fitness. The power of refusing to appoint any but a designated candidate might possibly be employed with a view to compelling the submission of that name, but it would be a manifest abuse of power.

These judges also hold office for life and can only be removed by judicial sentence, the trial not being by impeachment before the senate, as in the United States, but before the supreme court. Their salary, moreover (at present 19:320$000 a year, or about $5,000 at normal exchange of 4 milreis to the dollar), is protected against diminution. The jurisdiction of the sectional or district judges extends to all cases of federal jurisdiction save those designated as

[1] See above, p. 112.

within the original and exclusive jurisdiction of the supreme court. The final jurisdiction of the district courts is limited to civil cases involving suits up to 2 contos, or about $500 in the normal American equivalent. Aside from the trial of crimes in international law and of political crimes, enumerated in article 60 (*h*) and (*i*), the federal district courts have jurisdiction over crimes of counterfeiting, falsification of instruments or documents connected with the collection of federal revenues, and any acts of spoliation against the national treasury.[1] Though these are clearly crimes that should be judged by federal rather than by state courts, it is not clear on what provision of the judiciary article they can be based, and in the absence of a provision including such crimes in the jurisdiction of the federal courts they should, according to the constitution, be tried by the state courts.

Another curious provision relating to the district judges is the election law, which not only imposes on the district judges important administrative functions in connection with the law governing federal elections, but also makes them presidents of the canvassing-boards in their respective districts for examining the legal validity of the election acts turned in to them by the subordinate election authorities. No question seems to have been raised as to the propriety or constitutionality of imposing such extra-judicial functions upon the courts.

In each district there is a substitute judge appointed by the president of the republic for six years from among bachelors or doctors in law, and supplementary judges are appointed in the same way for four years to act in place of the substitute judge, their names being proposed by the district judge from among "good citizens in the enjoyment of their political rights, with preference for graduates in law."

The *procurador geral,* or attorney general, is represented in each judicial district by a district-attorney, *procurador da Republica,* appointed by the president from among bachelors or doctors in law and removable for the good of the service, that is, without a right to judicial trial.

Finally, the judicial machinery of the federal district courts includes the institution of the federal jury, one of the most curious examples of a Latinized institution of Anglo-Saxon origin to be found in America, the more so as Brazil is practically the only Latin-American country of importance in which the jury is actually used. The jury was first introduced in Brazil for the trial of offenses of the press by the law of October 2, 1823, regulating the liberty of the press. The first application of the new institution occurred in Rio de Janeiro in 1825,[2] the imperial constitution of 1824 having meanwhile stipulated a broader application of the jury system, by providing that the

[1] Pedro Lessa, *op. cit.*, pp. 256 ff.

[2] See Bastos, José Tavares, *O Jury na Republica* (Rio de Janeiro, 1909), which gives all the legal provisions, state and national, relating to the trial by jury.

judicial power should consist of judges and jurymen to be employed in both civil and criminal trials in the cases and manner to be determined by the codes.[1] By the criminal code of 1830 and the code of criminal procedure of 1832, both indictment and trial by jury were established for criminal cases, but the requirement of a civil jury was never put into effect. None of the preliminary drafts of the republican federal constitution contained any reference to the institution of jury trial, whether for civil or criminal cases, not even the provisional government's draft of October 23, 1890, promulgated after decree No. 848 had stipulated jury trial for all crimes justiciable in federal courts. Neither did the committee of 21 of the constituent congress recommend any mention of jury trial in the constitution, but from the floor of the congress an amendment was proposed and adopted stipulating that the institution of the jury should be maintained, a stipulation which was included in the final revision in the declaration of rights.[2]

A constitutional question soon arose as to whether this provision of the constitution stipulating the maintenance of the institution of the jury meant its guaranty in both civil and criminal cases, as provided in the imperial constitution, or only in criminal cases, as actually put into effect by legislation. But so far from answering the question in the broader of the senses indicated, namely, to include the jury in civil cases among the constitutional guaranties, the later legislation restricted the scope of application of the jury in criminal trials considerably as compared with the earlier practice. So widespread has been the hostility to the jury trial that most Brazilian jurists are agreed that even though it can not be wholly abolished without a constitutional amendment it should be restricted within the narrowest possible limits.[3] Only here and there do defenders of the system raise their voice and argue that the evils experienced under the jury system are due to extraneous and remediable causes and not attributable to the inherent nature of the system.[4]

As established by the legislation now in effect, there is in every state capital a federal jury consisting of twelve members, chosen by lot from among forty-eight citizens qualified as jurymen according to the laws of the state in which each is located.[5]

The organization and function of the federal jury are regulated by federal law, the verdict being by majority vote, a tie being favorable to the defendant and the vote being secret.

The decree of 1898, consolidating the laws relating to the federal judiciary, defined the jurisdiction of the federal jury as follows:

[1] Constitution of the Empire of Brazil, art. 151.
[2] *Ibid.*, art. 72, sec. 31.
[3] See Bastos, *op. cit.*, Ch. I.
[4] Barbalho, *op. cit.*, pp. 336, 337.
[5] The qualifications established for jurymen by the laws of the various states are very similar in all of them, all electors being subject to jury duty with enumerated exceptions. The laws of all the states relating to the jury are reproduced in Tavares Bastos, *O Jury na Republica.*

(*a*) Political crimes, such being the crimes defined in Book II, and title 2, chapter 1, of the Penal Code;

(*b*) Acts of sedition against a federal officer or against the execution of acts and orders emanating from a legitimate federal authority, in conformity with the definition of article 118 of the Penal Code;

(*c*) Resistance, disrespect, or disobedience to a federal authority, or removing prisoners of the federal judiciary, in accordance with the dispositions of chapters 3 to 5 of title 2 of Book II of the Penal Code;

(*d*) Official crimes of federal functionaries not subjected to a special tribunal, title 5 of the same book of the Penal Code;

(*e*) Crimes against national property and the treasury, comprised in title 7 and chapter 1 of title 12 of the same book of the Penal Code;

(*f*) Crimes of counterfeiting, defined in title 6, chapter 1, of the same book;

(*g*) Falsification of acts of federal authorities, national bonds or certificates of indebtedness or other notes of the nation or a bank authorized by the federal government to issue them;

(*h*) Interception or extraction of federal postal or telegraphic messages, chapter 4 of title 4 of the same book of the Penal Code;

(*i*) Crimes against the free exercise of political rights in federal elections or processes connected therewith, chapter 1 of title 4;

(*j*) Bearing false witness in a matter falling within the federal jurisdiction, section 4 of chapter 2 of title 6 of the same book;

(*k*) Crimes of contraband as defined in article 265 of the Penal Code;

(*l*) The crimes defined in title 3, part 8, of the law of January 26, 1892.

By subsequent legislation this rather comprehensive list of crimes that required trial by the federal jury was restricted to numbers (*a*), (*d*), (*g*), (*h*), and (*j*), the others being now tried by the district judges alone,[1] and with a marked tendency, as has been noted, to reduce the application of the jury trial still more.

More important in its practical application, however, than the federal jury (save as regards the institution and functioning of the jury in the federal districts, which will be mentioned briefly a little later) is the status of the institution in the state courts, for, as has been seen, the great majority of ordinary crimes are tried there. Under the federal constitution the field of procedural legislation was left, as has been pointed out, to the states, so that the use or omission of the jury in criminal as well as civil cases would have been left to the discretion of the states had it not been for this brief sentence in the constitutional declaration of rights stipulating that the institution of the jury is maintained.

In the Brazilian constitution, in contrast with our own, the bill of rights of the federal constitution imposes limitations on the state governments as well as on the national government; hence this provision established the constitutional right to jury trial in the state courts as well as in the federal courts. But this did not impose a hard-and-fast jury system on the states in conformity with the federal system then existing, any more than it was interpreted to do for the federal gov-

[1] See Araujo Castro, *Manual da Constituição*, p. 165.

ernment itself. The states are free, therefore, to depart from the federal model, so long as the essential characteristics of the jury trial are preserved.

No absolute definition of these essentials can be given, but a good statement of the general point of view underlying the interpretation of this provision so far as divergent regulations of the states are concerned was given in a decision of the supreme court in 1899, in a review of a criminal case involving the validity of a state law so far as it dealt with the manner of selecting the jurors. The court in sustaining the validity of the law said:

> The characteristics of the tribunal of the jury are:
>
> I. As to composition:
>
> (*a*) The body of veniremen consisting of citizens qualified at regular intervals by authorities designated by law, drawn from all social classes, and having the qualifications previously established by law for the function of judge of the facts, with a right of appeal on the question of inclusion or exclusion from the jury list.
>
> (*b*) The council of judgment consisting of a certain number of judges chosen by lot from the list of veniremen in a number three or four times as great, previously drawn by lot to serve in a particular term of court, designated in advance by the presiding officer, and confirmed by the acceptance and rejection of the parties, the number of challenges being so limited as not to exhaust the veniremen summoned for the session.
>
> II. As to functions:
>
> (*a*) Isolation of the jurors from outside persons to avoid extraneous suggestions;
>
> (*b*) Charges and proofs of accusation and defense produced publicly before it;
>
> (*c*) The exercise of their judgment in accordance with their own conscience;
>
> (*d*) Irresponsibility for their vote for or against the accused.
>
> So long as these characteristics are respected, the legislatures of the states may alter the common law of the jury.
>
> In this class fall the provisions relating to the number of veniremen selected and summoned for the session and drawn for the jury.[1]

Summarized in briefer form, the states legislating with respect to the jury may not modify the substantial legal rights represented by this institution, which are all those the omission of which might leave less protected the impartiality and independence of the members of the council. In this category fall the secrecy of the vote in the reaching of the verdict and the peremptory challenge of a certain number of veniremen.[2]

The organization and function of the jury in the federal district are based upon special legislation, differing in many respects from that adopted for the federal jury in the district courts and from that

[1] Quoted in Barbalho, *op. cit.*, p. 338.
[2] Araujo Castro, *Manual da Constituição Brasileira*, p. 280.

in the state courts. Here the venire consists of 22 members, 7 of whom constitute the jury for each session. And, in addition to qualifications for voting, an annual income is required of approximately $600 (2:400$000) if from real estate and of $900 if from business, industry, public employment, or liberal professions.

The chief criticisms directed against the administration of criminal law in Brazil may be summarized in the single indictment that it is so lax as to be very deficient. Every phase of this function is subjected to severe criticism. The penalties of the criminal code itself are absurdly mild with reference to many serious crimes. There is no death penalty and the maximum punishment is imprisonment for 30 years. Even treason is penalized with only imprisonment of from 5 to 15 years. Murder is punishable with imprisonment of from 12 to 30 years. Rape is punishable with imprisonment of from 1 to 6 years, etc.

The institution of jury trial, and the defects in every step of the criminal prosecution from the first action of the police, then of the examining magistrate, then of the prosecuting officer in the defective preparation and presentation of the case, all combine to make convictions relatively rare, even with the penalties as mild as they are. As with us, a common charge is that the rich and influential go free and only the unprotected actually suffer the penalties of the criminal code. Such an accusation is, of course, incapable of either proof or refutation; but the notorious cases of flagrant crimes unpunished and even unprosecuted, where the author occupied a prominent social or political position or had influential family connections, are sufficiently numerous to give color at least to the complaint which the Brazilians themselves are very free to lodge against the administration of the criminal law.

As the great majority of criminal and civil cases are tried before the state courts, it is the caliber of those judges rather than of the federal judiciary that determines the day-to-day administration of justice. There is, it is true, great freedom of appeal to the federal courts in civil cases and a constitutional guaranty of appeal in cases of conviction for crime. But in the nature of things such appeals do not affect the great majority of cases, which though considered of minor importance in the eyes of the law, so far as the penalties imposed or the damages involved are concerned, are of primary importance to the individuals involved. Furthermore, the procedure in civil cases, as established by the code of procedure for federal courts and followed in the main by the state legislation on the subject, is expensive and long drawn out, so that it is preferable to suffer an appreciable loss rather than to resort to the courts.

Corruptibility of judges, especially of the higher state courts and of the federal courts, is not a charge that is frequently made, but it is

commonly acknowledged that ties of relationship and friendship play an unfortunate rôle in influencing the decisions of the judges, even of the highest courts, both in civil and in criminal cases.

A competent judgment based on thorough investigation of the actual administration of justice in the states and nation would require much more time and study than could be devoted thereto in the course of such a survey as this. But it is certainly not unfair to cite the expressions of competent Brazilian authorities on the unsatisfactory state of this phase of governmental activity, of absolutely basic importance in the relations between the government and the governed. Among the most recent as well as the most authoritative of such expressions is the brief statement made by the outgoing minister of foreign relations on November 15, 1922, incorporated in the farewell message of President Epitacio Pessoa. Speaking of the criticisms which came to his attention through the channels of foreign diplomatic representatives in Brazil, Dr. J. A. Marques wrote:

> The dissatisfaction of foreign nations is general with regard to the slowness of our courts in trying and deciding cases, especially in the federal judiciary. Governments and capitalists hesitate to enter upon commercial undertakings or to make contracts for public works in Brazil, fearful that some day they may have to resort to judicial proceedings; hence their withdrawal, or the imposition on their part of most burdensome conditions, with great prejudice for the country. I consider as indispensable a patriotic effort on the part of all thinking Brazilians in an effort to remedy an evil of such proportions.[1]

Other criticisms of a similar nature could be reproduced, but it is only fair to add that the unsatisfactory working of the jury system in criminal cases and the unconscionable burden of the law's delays are evils in our own system of judicial administration which have received the unsparing criticism of the most competent authorities on judicial reform in the United States. The administration of justice is at the same time the most important and the most difficult of the functions of any government, and as in every case that is brought to the courts there is always one of the parties that is dissatisfied with the result, and not infrequently both, impugning the ability or the motives of the court is one of the commonest ways of venting this dissatisfaction, which, in order not to incur the penalties of contempt or villification, takes the form of general attacks on the system or personnel. For that reason the opinions of the persons whose business transactions bring them into most frequent contact with the operation of the courts are likely to be the very ones whose estimate of their efficiency is likely to be least valuable.

[1] Printed in the *Jornal do Commercio*, Rio de Janeiro, November 16, 1922, p. 3.

CHAPTER VI.

THE DECLARATION OF RIGHTS.

There was practical unanimity among the various elements that contributed to the formation of the Brazilian republican federal constitution as to the desirability of incorporating into the instrument a declaration of rights and guaranties, and all the preliminary drafts contained a special chapter or article devoted to this subject. The constitution of the empire, already in 1824, enumerated most of the individual guaranties contained in the present constitution. Nothing was more natural, therefore, than that the new constitution of the federal republic of Brazil should follow the example of the other Latin-American constitutions, especially that of the Argentine Republic, in devoting a special portion of the instrument to these individual rights. Even the constitution of the United States, after omitting such an enumeration as unnecessary with respect to the national government, one of delegated powers, immediately received as additions the first ten amendments by almost universal demand and approval.

But the first important difference to notice between the Brazilian bill of rights and that of our own federal constitution is that, whereas the latter is a limitation on the federal government alone, the former is a limitation on the state governments as well as on the national government. What has been evolved in the United States by judicial interpretation of the fourteenth amendment since 1868 was practically incorporated in the Brazilian declaration of rights, though without any special provision making these prohibitions and guaranties specifically applicable to the state governments. In article 63, it is true, the right of the states to govern themselves in accordance with their own constitutions and laws is limited by the proviso that these respect the "constitutional principles of the Union." Every commentator on Brazilian constitutional law, and the supreme court as well, has asserted that, whatever else is included in these "constitutional principles," the declaration of rights is thereby imposed as a limitation of the freedom of the states to adopt constitutions and to enact laws, though conceivably those principles might have referred to the constitutional division of powers between nation and states under the federal system. In the draft constitution proclaimed by the provisional government, moreover, special mention was made of the personal rights assured by the federal constitution in addition to the constitutional principles of the Union, which would seem to indicate that they were two different matters. It may also be pointed out that with the whole field of civil, commercial, and criminal substantive

law assigned to the jurisdiction of the Union, there was less need than in the United States of extending the prohibitions of the federal bill of rights to the state governments.

In the redaction of the portion of the constitution that deals with the individual rights and guaranties, little care was used. Some of the provisions of Section II of Title IV relate to matters that do not properly fall within the category of individual rights, as, for instance, the provision of article 75, which stipulates that pensions can be awarded to public officials only in case of incapacity incurred in the service of the nation. On the other hand, other parts of the constitution contain provisions that would properly fall within the enumeration of individual rights, as, for instance, the prohibitions of article 11 on the establishment, subventioning, or embarrassment of forms of religious worship and on retroactive laws. Moreover, the heading of Title IV, of which the section on the declaration of rights is a subdivision, is entitled "Of Brazilian Citizens," whereas the protection of the fundamental rights enumerated in article 72 is expressly extended to foreigners resident within the country, as well as to Brazilians.

CITIZENSHIP AND POLITICAL RIGHTS.

This leads to a natural division of the individual rights guaranteed by the Brazilian constitution into political rights and civil rights, the former restricted to Brazilian citizens, the latter extended to all persons, whatever their allegiance. And this indicates the preliminary examination of citizenship in general in Brazil. Citizenship in Brazil, as with us, is national, there being no such thing as state citizenship apart from national citizenship, or even, as there is in the United States, state citizenship alongside of national citizenship. A citizen of Brazil is a citizen of all the states, not merely of the one in which he resides,[1] though the Brazilian constitution in article 60, *d*, speaks of citizens of the states. This expression, used in conferring jurisdiction on the federal courts in cases of diversity of citizenship, has been interpreted to mean any persons resident in the state, whether Brazilians or foreigners.[2]

The constitution of Brazil recognizes six classes of citizens:

1. Those born in Brazil, even of a foreign father, if the latter is not in Brazil in the service of his own country;
2. The children of Brazilian fathers and the illegitimate children of Brazilian mothers, born abroad, if they establish their domicile in the republic;
3. The children of a Brazilian father abroad in the service of the republic, as long as they do not establish a residence there;
4. Foreigners who were in Brazil on November 15, 1889, and who did not within six months after the effectiveness of the constitution declare their intent to preserve the nationality of their origin;

[1] Araujo Castro, *Manual da Constituição Brasileira*, p. 295. [2] *Ibid.*, p. 161.

5. Foreigners who own realty in Brazil and are married to Brazilian women or have Brazilian children, as long as they reside in Brazil, unless they manifest their intention to retain their original nationality;
6. Foreigners naturalized in other ways.[1]

As regards citizenship by birth, based on the dual principles of the *jus sanguinis* and the *jus loci* in modified form, the constitution of the republic merely continued the provisions of the imperial constitution. The tacit naturalization contained in numbers (3) and (4) is new. The express naturalization permitted by number (6) is regulated by laws and decrees of 1908.[2] It is open to a member of any race or nationality, of legal age, of good moral character, not convicted of certain serious crimes, and having at least two years of residence in the country. The residence requirement is waived in the case of foreigners married to Brazilian women, or owning realty in Brazil, or sharing in the ownership of an industrial establishment, or inventing or introducing a useful industry of any kind into the country, in the case of superior capacity or education or skill in any branch of industry, and in the case of the children of naturalized foreigners born before such naturalization. The naturalization papers are issued by the minister of justice and internal affairs upon petition of the applicant duly authenticated by the local police authorities.

No distinction is made in the public law of Brazil between natural-born and naturalized citizens, except in the case, specified also in our own constitution, of election to the presidency and vice-presidency, which is open to natural-born citizens only, and in the case of election to the national congress, which requires citizenship of four years for the chamber of deputies and six years for the senate.

Article 71 deals with the suspension and loss of the rights of Brazilian citizens. These rights are the political rights of voting, under conditions established by the constitution, and of holding office, elective or appointive, under the qualifications and conditions imposed by law. Corollary to these rights, which include also, though not expressly, the right to due protection abroad, is the duty of military service, imposed on all Brazilians by the constitution, and other duties, such as serving on juries, etc., which are also restricted to Brazilian citizens. The suspension of these rights, and by implication also of these duties, of citizenship occurs by reason of physical or mental incapacity or because of conviction for crime, during the consequences of the same.[3] The loss of these rights results through naturalization in another country, through the acceptance of employment or pensions from a foreign government without permission of the executive,[4] through the allegation of religious motives as an excuse

[1] Constitution of Brazil, art. 69.
[2] Decree No. 6,498, of May 14, 1908, and law No. 2,004, of November 26, 1908. Summarized in Araujo Castro, *op. cit.*, p. 296.
[3] Constitution of Brazil, art. 71. [4] *Ibid.*

for escaping any of the duties imposed by law on Brazilian citizens, and through the acceptance of foreign decorations or titles of nobility.[1] The loss of these rights is established by a decree of the executive power.[2]

Once lost, the rights of citizenship may be reacquired in accordance with the terms of a law of June 7, 1899, which permits Brazilians who have become naturalized in other countries or have received foreign decorations or titles of nobility to reassume their Brazilian citizenship upon becoming residents of Brazil and making a formal signed statement before the proper authorities that they are ready to assume the duties of citizenship or that they have renounced the decorations or titles in question. A decree of the executive likewise establishes the reacquisition of such rights.

Dual citizenship is possible under the Brazilian constitution and laws, but Brazil expressly stipulates that in the case of the Brazilian naturalization of foreigners, these are not relieved of the obligations incurred by them in their country of origin before naturalization.

CIVIL RIGHTS.

Article 72 of the constitution declares that it assures to Brazilians and resident foreigners alike the inviolability of the rights of individual liberty, security, and property, as defined in the succeeding terms. It is commonly stated, therefore, that in Brazil no distinction exists as regards civil rights between citizens and foreigners, and as a general rule this is true. But there are certain exceptions recognized in law and in practice, if not in the express terms of the constitution. The most important of these will be summarized here before taking up the discussion of the civil rights in general. It may be pointed out first of all that this equality of foreigners and citizens in the matter of civil rights did not exist under the constitution of the empire, which guaranteed them only to Brazilian citizens, but it was included in every one of the preliminary drafts of the republican constitution.

Article 13 of the constitution restricts coastwise trade to ships of Brazilian nationality, thus discriminating against foreign undertakings, constituting a limitation of the right of acquiring property and of engaging in the activity of managing corporations engaged in that traffic or of commanding ships engaged in that trade. The constitution of the empire contained no such restriction, which was introduced by legislation in 1836, subsequent legislation in 1860 and 1862 establishing exceptions thereto. The limitation in the constitution of the republic is in terms absolute, but, in spite of that fact, the law of November 11, 1892, and the subsequent regulation of October 23,

[1] Constitution of Brazil, art. 72, sec. 29. The qualifying phrase "of nobility" modifies decorations as well as titles. See Araujo Castro, *op. cit.*, p. 298, n. 3.

[2] Law No. 569, of June 7, 1899.

1913, permit exceptions in favor of the transportation of passengers, their baggage, animals, agricultural products, perishable goods, etc. In practice, therefore, this constitutional discrimination against foreigners with regard to the coastwise trade, a discrimination encountered in the constitution or laws of almost every country, is not insisted upon.

A second discrimination made in practice between citizens and foreigners relates to the right of expulsion by executive act, a matter which has been the subject of a great deal of controversy in Brazil, and can not even yet be regarded as settled. Under the imperial constitution there was nothing to prevent the expulsion of undesirable aliens, since, as has been noted, the guaranty of individual rights applied in terms only to Brazilian citizens. The republican constitution, however, expressly classed foreigners resident in the country with Brazilian citizens, so far as the guaranty of individual rights was concerned, and prohibited judicial banishment, which had existed under the empire. In the face of this clear declaration of the constitution, the supreme court, in two decisions in 1892 and 1893,[1] sustained the power of the executive to expel undesirable aliens.

In 1907 the congress passed a law expressly authorizing the expulsion of any foreigner who for any reason endangers national security or public tranquillity, or who had been prosecuted or convicted abroad for ordinary crimes, or twice by Brazilian courts, or who is a vagabond, a beggar, or a panderer. From this liability to expulsion were excepted foreigners who had resided two consecutive years in Brazil or who were married to Brazilian women or were widowers with Brazilian children.[2] The constitutionality of this law was likewise sustained by the supreme court.

In 1913 another law repealed the article of the preceding law which established the exceptions to this power of expulsion, whereupon the supreme court held, contrary to its earlier decisions, that if the foreigner could prove residence within the concept of the civil law he was protected by the constitution against deportation.[3] In later decisions, relating to the exercise of the power by the executive to expel foreigners at the period of Brazil's entry into the Great War, the supreme court on various occasions denied a writ of *habeas corpus* to foreign anarchists, on the ground that they did not reside in the country, even though some of them had been in Brazil for ten or even twenty years. Though the supreme court has not expressly reversed its position with regard to the protection accorded by article 72 of the

[1] Accórdãos No. 322, of June 6, 1892, and No. 388, of June 21, 1893, quoted in Barbalho, *op. cit.*, p. 300, which writer approves the doctrine there set forth, on the ground that the constitution can not have meant to place the guaranty of foreigners above the guaranty of the nation itself.

[2] Law No. 1,641, of January 7, 1907, quoted in Araujo Castro, *op. cit.*, p. 284.

[3] Pedro Lessa, *op. cit.*, pp. 425, 426.

constitution to foreigners resident in Brazil, its decisions lead to the same result, and individual members have expressed themselves as opposed to the recognition of any such protection. That such a limitation of the right of expulsion is not encountered in the constitutions of other nations is hardly a sufficient argument for nullifying the express declaration of article 72, and if a broader right of expulsion is desired the better remedy would seem to lie in the requisite amendment of the constitution in this respect.[1]

Still another limitation of the broad equality assured by article 72 to resident foreigners in the matter of individual guaranties is to be found, according to Barbalho, in the doctrine that the rights of association, petition, and liberty of speech and of the press are not as broad for them as for Brazilian citizens. These fundamental rights can not be exercised by foreigners with reference to political matters or ends,[2] for then they lose their character of civil rights and partake of the nature of political rights, which are guaranteed only for citizens. But Barbalho cites no supporting opinions or decisions, and in their absence it would seem to be the correct, though perhaps inconvenient and unwise, rule that no such restriction on the rights of foreigners in these respects is admissible.[3]

PERSONAL LIBERTY AND SECURITY.

The most fundamental of the individual guaranties are those relating to personal liberty and security, especially those relating to the arrest and trial of persons accused of crime. These guaranties are included in sections 13 to 16 of article 72 in the following terms:

> Sec. 13. Except in *flagrante delicto* no one may be arrested until after formal accusation of the suspect, save in the cases determined by law, and upon written order of the competent authority.
>
> Sec. 14. No one may be kept in confinement without formal arraignment except in the cases specified by law, nor taken to prison or kept there if he offers requisite bail in the cases in which the law permits it.
>
> Sec. 15. No one may be sentenced save by the competent authority by virtue of an existing law and in the manner stipulated therein.
>
> Sec. 16. The most extensive defense shall be secured by law to the accused with all the appeals and measures essential thereto beginning with the written accusation furnished the person arrested within twenty-four hours and signed by the competent authority with the names of the accuser and of the witnesses.

These are practically restatements of provisions of the imperial constitution of 1824, which went even further into detail in guarding against arbitrary arrest and imprisonment, abuses which had been very common up to the time of independence. Though the requirements of formal accusation (*pronuncia*) and formal arraignment (*culpa formada*) are subject to exceptions specified by law, these

[1] See on this point Araujo Castro, *op. cit.*, pp. 283–291.
[2] *Op. cit.*, p. 301.
[3] Araujo Castro, *op. cit.*, pp. 235, 236, 240, 245.

exceptions, specified in the code of criminal procedure, are not extensive. The criminal code makes these guaranties effective by defining and making punishable violations of the same. (Penal Code, arts. 180, 181, 207.)

Other guaranties of personal liberty and security are found in the general provision which states that no one may be compelled to do or to refrain from doing anything except by virtue of law,[1] the prohibition of laws working corruption of blood,[2] the abolition of the penalty of the galleys, of banishment, and of death,[3] the prohibition of special tribunals,[4] and the maintenance of the institution of the jury.[5]

The great safeguard of liberty and security of the person, however, is to be found in the provision which assures *habeas corpus* whenever an individual suffers or finds himself in imminent danger of suffering violence or coercion illegally or abuse of power.[6] The history and application of this writ of protection in Brazil are full of interest and importance, the more so as they further illustrate the application of an Anglo-Saxon legal institution to a country whose jurisprudence and legal traditions are continental European.[7]

The writ of *habeas corpus* was unknown in Brazil prior to her separation from Portugal and was not even mentioned in the imperial constitution of 1824. The first mention of this writ was contained in the code of criminal procedure of 1832, which provided, in article 340, that "any citizen who conceives that he or another suffers an illegal imprisonment or restraint in his liberty has the right to demand an order of *habeas corpus* in his favor." Within two hours after receiving the application of the petitioner, the judge to whom it was presented was to order the appearance of the petitioner before him. By a law of September 20, 1871, article 18, this protection was extended to cover cases where the petitioner was merely threatened with bodily restraint and where the action complained of was that of administrative authorities, eve nincluding cases of impressment into military service. This law also extended the protection of the writ to foreigners.

The preliminary-draft constitution of the commission of five included the writ of *habeas corpus* in the declaration of rights, and the draft of the provisional government, promulgated in June, 1890, included the same in essentially the same language. Decree No. 848, of October 11, 1890, organizing the federal judiciary, devoted a special

[1] Constitution of Brazil, art. 72, sec. 1. [2] *Ibid.*, sec. 19. [3] *Ibid.*, secs. 20, 21.
[4] *Ibid.*, sec. 23. [5] *Ibid.*, sec. 31. [6] *Ibid.*, sec. 22.
[7] The most comprehensive study of the application of the writ of *habeas corpus* in Brazil is to be found in José Tavares Bastos, *O Habeas-Corpus na Republica* (Rio de Janeiro, 1911), in which he gathers together the decisions of state and federal courts on this subject. A briefer discussion is to be found in Lessa, *Do Poder Judiciario*, pp. 265–426, and a summarized statement in Araujo Castro, *Manual da Constituição Brasileiro*, of which latter free use has been made in the following presentation.

chapter to the *habeas corpus*, the principles of which had been fairly well developed under the law of 1871. It also included the stipulations already embodied in the preliminary draft of the commission of five and of its own draft constitution insuring a right of appeal to the federal supreme court from the state courts in regard to the writ of *habeas corpus*. The constitution of 1891 did no more than confirm these provisions (arts. 61 and 72, sec. 22).

Amplified by subsequent legislation and by interpretation of the federal supreme court, the *habeas corpus* in Brazil has proved to be one of the most important actions, not only in criminal matters but in constitutional questions, brought before the federal supreme court. In 1900, for instance, there were 75 cases in the federal supreme court out of a total of some 364 cases decided, involving the writ of *habeas corpus*, and in recent years the proportion, though not so great as that, has continued to be considerable. It has developed into quite a different legal institution, therefore, from the English prototype, or its North American application.

The federal supreme court was given original jurisdiction by the law of November 20, 1894, to issue the writ of *habeas corpus* when the restraint or the threat thereof emanated from an authority whose acts were subject to the jurisdiction of the court, or was practised against a federal judge or official, or when crimes subject to the judicial jurisdiction of the federal government were in question, or, finally, in case of imminent danger that the violence would be committed before another court or judge could take cognizance of the matter in first instance.[1] This jurisdiction was subsequently restricted by the court itself, as has been seen,[2] to include only the first and last cases and the case when the writ is asked against coercion practised by a federal district judge.

The federal district courts are authorized to issue the writ likewise when the imprisonment or threat thereof is made by a state authority, if crimes falling within the federal judicial jurisdiction are in question, or the act is directed against officials of the Union. From their decision there is appeal to the supreme court.

In all other cases the state courts are the proper authorities to issue the writ in the first instance, the constitution guaranteeing an appeal to the supreme court, and the law stipulating that such appeal shall lie in case the writ has been denied, and that it can be taken directly to the federal supreme court from the state court of first instance that has denied the writ, independently of action by a state court of second instance.

The constitution says the *habeas corpus* shall issue whenever an individual suffers or finds himself in imminent danger of suffering

[1] Law No. 221, of November 29, 1894, art. 23. [2] See p. 111.

violence or coercion, illegally, or abuse of power. Not only the person himself, however, but anyone, citizen or foreigner alike, may make application for the writ in his favor, stating the name of the person who is experiencing the violence or threat thereof and the name of the person who is the cause or author of the same. The application should also state the substance of the order by which the imprisonment occurred, or the explicit declaration of what was demanded and denied him, and, in case of threat, simply the reasons why it is feared that the injury will be done him. Finally, the petition should contain the grounds for regarding the imprisonment as illegal or the threat unlawful.[1] It has even been held that in cases of urgent necessity the writ might be invoked by telegram. Independently of any petition by the person involved or by any other person, the writ of *habeas corpus* may issue from the federal courts in the proper cases, *ex officio,* whenever it appears in the course of a trial or suit that any citizen, judicial officer, or public authority is keeping anyone illegally in confinement or under guard.

The constitutional guaranty of the writ says "whenever." To this there are only certain rare exceptions, to wit: in case of the state of siege, to be considered later; in the case of persons belonging to the military forces of the nation; and in case of persons committed to confinement by administrative order by reason of being responsible to the public treasury for money or valuables in their possession and not duly entered or delivered. Even in the latter case *habeas corpus* will lie if the application is accompanied by a receipt or certificate of deposit.[2]

As a judicial safeguard against arbitrary arrest and imprisonment, the writ of *habeas corpus,* in the hands of a judiciary enjoying life tenure, appears in Brazil, by virtue of its wide application, both as regards the persons who may invoke it and the judges who may issue it, as well as by reason of the broad grounds on which it can be issued, to serve its fundamental purpose of protecting the liberty and security of the individual. But more curious, if not more important, is the use to which the writ of *habeas corpus* is put in Brazil in the protection of political rights, and it is in this respect that the application of the writ in Brazil diverges most emphatically from its employment in the country of its origin, England, in the country of its constitutional application, the United States, and in the countries that have in general modeled their governmental systems on our own, such as the Argentine.

In discussing the invocation and issuance of the writ of *habeas corpus* for the guaranty of the exercise of public elective functions, Pedro Lessa[3] begins by stating that the propriety of issuing the writ

[1] Decree No. 848, of October 11, 1890.
[2] Decree No. 3,084, of November 5, 1898. Cited in Pedro Lessa, *op. cit.*, p. 276.
[3] *Do Poder Judiciario*, pp. 276–351.

has been settled by countless decisions of the supreme court in the case of a Brazilian citizen who applies therefor, alleging and proving that he is legally invested with a public office but is prevented from exercising it in consequence of coercion resulting from an unconstitutional or illegal act of a federal or state authority. In discussing the famous case of a *habeas corpus* issued in 1911 in favor of the members of the municipal council of the federal district[1] who applied for the writ to protect them in their liberty of entering into the council chamber and exercising their legal functions, after the president of the republic had by decree ordered new elections, and declaring that the supreme court was without jurisdiction to issue the writ, Pedro Lessa, member of the supreme court who wrote and delivered the opinion of the court, gives a detailed account of the reasons for that decision and for other opinions of his and of the supreme court in the application of the writ in similar cases.

As is pointed out in that case, the decisions of the supreme court, though not by any means all reconcilable with one another, are based on the ground that the writ of *habeas corpus* is fundamentally a writ to guarantee liberty of motion, and that if it is perfectly clear that a petitioner is entitled to assume an office to which he has been duly appointed or elected his liberty of motion to perform the acts connected with such office will be protected by the writ, even though the matter is political, in the sense that it refers to public office. He emphasizes the point, repeatedly stressed in the decisions of the supreme court, both before and since the case of the municipal council, that in such case the right of the petitioner must be "certain, liquid, and incontestable"; that is, the court in issuing the writ in such cases can not and does not go into controverted questions, such as, for instance, whether a public officer who has been dismissed from office committed an offense for which the law permits removal, but where the right to the office is "certain, liquid, and incontestable" the supreme court can guarantee the liberty of locomotion necessary to the exercise of the office in question.

But the whole controversy revolves itself around the meaning of the apparently definite terms quoted above, and in every case in which the writ of *habeas corpus* has been invoked for the preservation of an official in his office, whether the writ was issued or denied, and there have been a vast number of both kinds of decisions by the federal supreme court, the discussion of these terms and their application to the case in question occupies the major portion of the consideration and decision of the case. In the very case in which Pedro Lessa was so emphatic that the right of the petitioners met these fundamental requirements, the political opponents of the councilors

[1] Accórdão No. 2,990, of January 25, 1911.

in question denied their right, and the president of the republic so far denied this right as to disregard the decision of the supreme court, which decision asserted that it was "certain, liquid, and incontestable." In most of the cases, moreover, in which the writ has been issued by the supreme court to protect an elective officer in the exercise of his functions, the court has been divided. When members of the supreme court itself are in doubt about the right claimed by the petitioner, it is difficult to see how the majority can base the issuance of the writ on the ground, always asserted, that it is "certain, liquid, and incontestable." The situation is similar to that in the United States where the supreme court has repeatedly declared that a law should be declared unconstitutional only when it is "clearly" so, and yet has on more than one famous occasion declared laws unconstitutional by a divided bench of five to four.

The truth of the matter is that in practically all of these cases of *habeas corpus* in Brazil to protect an elective officer in the exercise of his mandate under guise of assuring him merely liberty of locomotion, be the officer a municipal councilor, a member of the state legislature, a state president, or even the vice-president of the republic—all cases of actual occurrence—the writ is sought by petitioners whose right, though perhaps capable of proof, is not "certain, liquid, and incontestable," and the issuance of the writ in such cases inevitably draws the supreme court into the whirlpool of personal or factional politics, with the deplorable result, already noted in the case of the municipal councilors of Rio de Janeiro, that the executive is quite likely to disregard such decisions.

Two of the most recent instances of the invocation of this writ to settle what are in reality political controversies will serve to show not merely the vacillating nature of the decisions of the supreme court in such matters but also the practical evils that may result from the exercise of this jurisdiction. The two cases in question, already referred to elsewhere, are the *habeas corpus* in favor of J. J. Seabra, unsuccessful candidate for the vice-presidency in the elections of 1922, and the *habeas corpus* in favor of Raul Fernandes, alleged president-elect of the state of Rio de Janeiro.

In the former case the supreme court reversed the action of the federal district judge in granting the writ of *habeas corpus* to assure the candidate the exercise of the vice-presidency during the four years 1922–1926. As has been seen elsewhere, Dr. Seabra claimed the office on the ground that his opponent, successful in the popular election of March 1, having died before the canvassing of the vote by congress and so having become "ineligible," he, having received more than half as many votes as his ineligible opponent, was entitled to succeed to the office. The national congress had declared that as a result of the death of the successful candidate a vacancy had occurred that called

for a new election, and that it was not a case of ineligibility within the meaning of the electoral law. The district judge in the federal district had issued the writ, conceiving, therefore, that the right of the candidate in question was "certain, liquid, and incontestable," although the question was being discussed and argued with the greatest heat throughout the country. But the supreme court annulled the writ on appeal of the attorney-general, by a divided court, in which the prevailing opinion seemed to rest on the ground that this was a purely political question not falling within the jurisdiction of the judiciary.[1]

Less than six months later, when a controversy arose in the neighboring state of Rio de Janeiro as to which candidate for the presidency of the state was duly elected and entitled to take office on December 31 of the same year, the supreme court on December 27 issued the writ of *habeas corpus* in favor of Raul Fernandes and Arthur Costa, claimants to the offices of president and vice-president, respectively, "that they might on December 31, free from any restraint whatsoever, take office and assume the exercise of the offices to which they were elected, recognized, and proclaimed elected by the authority competent under the state constitution to do so."

This decision, which aroused the most widespread comment and criticism, was peculiar from several points of view. The controversy over the state elections in November culminating in the functioning of two alleged state legislatures was a political one *par excellence,* involving not merely state politics but national politics as well, as the leader of the dominant faction belonged to the political following of Dr. Nilo Peçanha, federal senator from that state, unsuccessful candidate for the presidency in the preceding federal elections, and bitter opponent of the national administration. Moreover, on December 23, the president of the republic had sent a message to the national congress inviting their attention to the existence of a duality of legislatures and governors in the state of Rio, presenting a case for the decision of the congress under the accepted doctrine of federal intervention in the states in such cases.

In the face of these facts, and of its earlier decisions, the federal supreme court, by a vote of six to five, issued the writ of *habeas corpus* in the terms indicated above.[2] The majority of the court, in order to reconcile its decision with the earlier holdings in such cases, had to conceive that the case was not one of a purely political nature and also that the right of the petitioners was "certain, liquid, and incontestable."

If the decision of the supreme court in this case was curious and difficult to reconcile with the trend of the earlier decisions, no less

[1] The case is reported in the *Jornal do Commercio* of Rio de Janeiro, July 4, 1922.
[2] *Ibid.*, December 28, 1922.

curious were the consequences of the same. The president of the republic accorded recognition to the writ of the supreme court and ordered its execution, under which the petitioners assumed office before the state supreme court, not only without interference by federal authorities but even under their protection, on December 31, the day on which the national congress adjourned. At the same time, however, the opposition candidates assumed office, or went through the forms of assuming office, before the other alleged legislature and claimed to be rightfully in the exercise of governmental powers. The candidate protected by the writ of *habeas corpus* having protested to the president of the supreme court that the terms of the writ were being violated, and the federal district judge in the state of Rio having been instructed by the latter to see that the writ was properly executed, and he having reported that the writ had in fact been fulfilled, the president of the republic, on January 10 issued a decree of federal intervention in the state of Rio and appointed a federal intervenor to take over the government of the state. Thereupon the whole matter was taken up again in secret session by the supreme court, which, in view of the manifest impossibility of doing anything else, by a vote of eight to four rejected a motion of protest against the action of the president and so closed the matter so far as the court was concerned, saving its dignity by accepting the view that the writ had been fulfilled and that the decree of intervention based on subsequent disturbances and duality of government in the state did not violate the decree of the court. Having undertaken to settle a political question, the court found itself once again obliged to defer to the opinion of the executive, who possesses the actual power of settling such questions in practice. Irrespective of the merits of this particular controversy, the case is a striking example of the fact that the court is treading dangerous ground when it takes jurisdiction of such cases, which can only result in drawing it into the vortex of political controversy, in diminishing its prestige as a non-political organ, and in a defeat when pitted against the unquestionably superior political power of the executive branch of the government.

RELIGIOUS LIBERTY.

In the field of liberty of conscience and of worship, the republic made sweeping changes. It is true that the constitution of the empire had included among the guaranties of civil rights of Brazilian citizens a provision that no one could be persecuted for religious motives so long as he respected the religion of the state and did not offend public morality.[1] The criminal code of 1830, moreover, made punishable by imprisonment any violation of this precept. But it must be recalled that the declaration of rights under the imperial constitution applied

[1] Constitution of the Empire of Brazil, art. 179, V.

in terms only to citizens, and by article 5 of that constitution the Roman Catholic Apostolic religion continued to be the state religion, other religions being permitted to worship only in buildings without any external appearance of a church. Civil marriage was not recognized, instruction was largely in the hands of the Catholic church, cemeteries belonged to and were administered by religious corporations, and the public treasury supported the Catholic church to the necessary extent, the accumulations of ecclesiastical property having become so extensive as to require statutes of mortmain even during the colonial era.

Among the most sweeping of the measures instituted by the provisional government, as well as among those most widely criticized, was the decree of January 7, 1890,[1] which laid the basis for the provisions subsequently inserted in the republican constitution. This decree forbade the federal and state authorities alike to enact laws, regulations, or administrative measures establishing or prohibiting any religion, or creating distinctions between inhabitants or in the undertakings supported by public funds, on the basis of religious or philosophic beliefs or opinions. Complete religious equality was declared and every religious corporation was protected in the possession and administration of its property. The imperial power of appointment to ecclesiastical office was abolished, but the federal government was authorized to contribute to the support of the local substitute officials of the Catholic church, and the states were expressly left free to support the ministers of this or of any other form of worship, within the limits of the prohibitions established in the decree. In the same month the provisional government issued a decree establishing civil marriage,[2] and by a later decree of the same year[3] prohibited church marriage ceremonies prior to the civil marriage, a matter which had been permitted under the earlier regulation. By still another decree of the provisional government,[4] the secularization of cemeteries was effected, the jurisdiction over the same being put into the hands of the municipalities, with the prohibition of distinctions in favor of or in detriment to any church, sect, or religious confession, the existing cemeteries of private persons, brotherhoods, sisterhoods, orders or religious congregations, and hospitals being excepted from the operation of the law, but put under the inspection of the municipal police, the future establishment of private cemeteries being forbidden.

These fundamental principles of liberty of conscience, of religious worship, and of the separation of church and state were perpetuated in the draft constitution promulgated by the provisional government, and preserved, with only minor changes, in the document as approved and proclaimed by the constituent assembly. Article 11 of the con-

[1] Decree No 119 A.
[2] Decree No. 181, of January 24, 1890.
[3] Decree No. 521, of June 26, 1890.
[4] Decree No. 789, of September 27, 1890.

stitution expressly prohibits state and federal governments alike from establishing, subsidizing, or embarrassing the exercise of religious worship, and the declaration of rights in article 72, sections 3–7, elaborates these provisions as follows:

Sec. 3. All persons and religious confessions may exercise their mode of worship publicly and freely, forming associations for this purpose and acquiring property, the provisions of the common law being observed.

Sec. 4. The republic recognizes only civil marriage, the performance of which shall be free.

Sec. 5. Cemeteries shall be secular in character and shall be administered by the municipal authorities, all religious cults being free to practise their respective rites with regard to their own believers, so long as these do not offend public morals or the law.

Sec. 6. Instruction in public institutions shall be laic.

Sec. 7. No cult or church shall receive official subvention nor enter relations of dependence or alliance with the government of the Union or of the states.

In addition, section 28 of the same article stipulates that no Brazilian citizen may be deprived of his civil or political rights by reason of religious belief or activity,[1] nor excuse himself from the performance of any civic duty. Quite logically, it adds in the next section that those who allege religious belief for the purpose of avoiding any obligation imposed by law on Brazilian citizens shall lose all political rights.

It is safe to say that there is no other country in the world where the Roman Catholic faith is the traditional and prevailing faith of the inhabitants where there is a more complete separation of church and state or where there is greater freedom of conscience and of worship. In theory, there is even greater freedom guaranteed by the Brazilian constitution than by our own, for whereas there is nothing in the federal constitution of the United States that would prevent the individual states from establishing a religion or prohibiting the free exercise thereof, nor anything to prevent the states from requiring a religious test as a qualification for public office, in Brazil the federal constitution explicitly forbids such action on the part of the states.

The penal code contains an elaboration of these constitutional provisions by imposing penalties under a special chapter devoted to crimes against the free exercise of religious worship, making punishable outrages against any religious confession, or interference with its religious ceremonies, or threats or injuries against the ministers thereof in the performance of its functions.[2] Needless to say, the freedom of

[1] This must be read in connection with the provisions of article 70, section 4, which excludes from the voting privilege and, in consequence, from the privilege of holding office, members of monastic orders, religious companies, congregations or communities of whatever denomination subject to a vow of obedience, rule, or statute which involves the renunciation of individual liberty.

[2] Penal Code, Book II, Title IV, Ch. III.

worship guaranteed is subject to the general laws regarding public or private conduct and to the police regulations in the interests of public order. So the supreme court has held that a police order issued upon request of the ecclesiastical authorities of the Catholic church, prohibiting the parading of a sacred image of that church, against the prohibition of the church authorities, is not a violation of the freedom of worship, but a prohibition of the disrespect and villification forbidden by law in the very execution of the guaranty of the free exercise of every religious profession.[1]

LIBERTY OF SPEECH AND OF THE PRESS.

Of all the personal liberties, those of speech and of the press were perhaps the most completely suppressed during the colonial period in Brazil. Particularly was that true of the latter, for until the advent of the prince regent of Portugal in 1808, printing-presses were forbidden throughout the colony. In that year a royal printing-press was established in Rio de Janeiro, but not until 1821 was it permitted to private individuals to print anything without special permission and without prior censorship. But the decree of June 18, 1822, imposed the severest restrictions and penalties on words or prints that criticized the government, made even more stringent by a decree of the subsequent year, after Brazil had become an independent empire.

In the constitution of the empire of 1824 liberty of speech and of the press was guaranteed, though only to Brazilian citizens, in the following terms:

> All may communicate their thoughts by words and writings, and publish them in print, without dependence of censorship, while they must respond for the abuses which they may commit in the exercise of this right, in the cases and manner in which the law may determine.

In 1830 a more liberal law governing the press was enacted, and the penal code of 1830 dealt with the abuses in articles 7, 8, 9, 229–246, 278, and 279. By decrees of 1837 the matter was still further regulated.

After the overthrow of the empire, the provisional government was impelled to subject to trial and punishment by a military court those who by word or writing advocated revolt or military insubordination,[2] and in March of the following year it made these provisions even more stringent. In the draft constitution of June 22, 1890, the provisional government included the liberty of speech and of the press among the individual rights in almost the identical language of the imperial constitution, and in the penal code decreed on October 11, 1890, by the same government, Book III, Chapter IX, dealt with the illegal use of the typographic art, while defamation and libel were

[1] Accórdão, No. 3,925, of April 19, 1916. Cited in Araujo Castro, *op. cit.*, p. 266.
[2] Decree No. 85 A, of December 23, 1889.

treated in Book II, Title XI, and article 22 established collective liability, all of which provisions govern the liberty of the press to-day.

When the constituent congress came to consider the section of the bill of rights dealing with the liberty of speech and of the press, it adopted the provisions of the draft constitution submitted by the provisional government, but added a sentence prohibiting anonymity.[1] This amendment, proposed by the committee of 21 of the constituent congress, was vigorously attacked on second reading, but its adoption is praised by Barbalho, who points out that this prohibition was already contained in the decree of June 18, 1822, championed by José Bonifacio.

Liberty of speech and of the press is guaranteed, therefore, against censorship in Brazil, and this liberty is extended to foreigners as well as citizens, even in matters criticizing the government, though Barbalho argues against extending the guaranty to such lengths. The penalties imposed by the criminal code with reference to libel and defamation, as well with reference to infringement of authors' rights, etc., are the only general limitations created by law. But the criminal code requires that a license must be secured from the local authority in order to set up a printing establishment, the application for which must state the name of the owner, the year, the place, street, and number where the office is located, and every production must carry the above facts, under appropriate penalties.[2] The code, moreover, creates a joint liability, in crimes against the abuse of this liberty, for the author, the owner of the press or publication, the editor, and the vendor or distributor of printed matter when the owner of the press or journal is unknown or resides in a foreign country. Likewise, the vendor or distributor of writings not printed, which are communicated to more than 15 persons, is liable if the author is not known or if the distribution is made without his consent.[3]

Against abuses of the press in the villification of public officials or in inflammatory appeals to violence there seem to be lacking adequate safeguards in Brazil. It is true that slanders or libels falsely imputing acts defined as crimes are more severely punishable when directed against public officials in the performance of their acts than when directed against private individuals. But even so, the penality on conviction is only imprisonment from six months to two years, with a fine of from $100 to $250. Other defamation is even more lightly penalized, and truth of the statements made is admissible in defense when they refer to the public acts of a governmental authority or officer.

The virulence and lack of restraint of the political press in attacking the government, and even going so far as openly to advocate

[1] Constitution of Brazil, art. 72, sec. 12.
[2] Criminal Code of 1890, arts. 383, 384.
[3] *Ibid.*, art. 22.

measures of violence, have prompted the government, in times of disturbance, to resort to the declaration of a state of siege, sometimes with the primary purpose of subjecting the newspapers to a censorship, which is constitutional only under such conditions. This forcible muzzling of the press, practised most recently during the last six months of 1922, naturally arouses the bitterest criticism, and is obviously as capable of perversion as is the unrestrained license of the press itself. It would seem clear that a better solution of the problem would be the enactment of more stringent penal laws covering the responsibility of the press, rather than the arbitrary imposition of a censorship. But a law having this purpose in view was introduced in the last session of the national congress in 1922, and was prevented from passing amidst the almost universal condemnation of the very press that was suffering under the censorship, a censorship justified by reason of the lack of other necessary measures of restraint. It is difficult for us in the United States to appreciate the serious menace which the inflammatory attacks of a clever and conscienceless opposition press constitute to the public order in centers like Rio de Janeiro. The unfortunate occurrences of July 5 and 6, 1922, were quite generally laid largely to the treasonable incitements of the unrestrained opposition papers. The lack of an effective law of criminal liability concerning these points seems to condemn the nation, as regards liberty of the press, to a series of oscillations between inexcusable license and intolerable repression.

LIBERTY OF OCCUPATION.

An express guaranty of the Brazilian constitution not included as a specially enumerated liberty in the American bill of rights is that contained in article 72, section 24, which reads: "The free exercise of any moral, intellectual, or industrial profession is guaranteed." With us this guaranty flows from the general "due-process" clause, but in Brazil it was especially enumerated among the rights of citizens even in the imperial constitution of 1824.[1] Curiously enough, the draft constitution of the provisional government did not include the specific enumeration of this right, though it was in the draft prepared for it by the commission of five. The committee of 21 of the constituent congress added the guaranty in its present form, but an insistent effort was made to add an express declaration to the effect that the exercise of professions should not only be freely guaranteed but that they should be independent of the possession of any academic title or decree. This was an outcropping of the positivistic theories of Le Comte that had such a sway in the intellectual world of Brazil at the time of the republican revolution in 1889.

[1] Constitution of the Empire of Brazil, art. 179, XXIV: "No kind of work, intellectual, industrial, or commercial, may be forbidden, so long as it is not contrary to good customs or to the security and health of citizens."

In spite of the express rejection of these amendments in the constituent congress, and of later legislative proposals introduced into the congress with the same purpose and repeatedly rejected, as well as of the consistent interpretation by the executive branch of the government and the decisions of the supreme court, cases are continually arising in which parties invoke this section of the constitution as forbidding the imposition of degrees or other proofs of fitness for the practice of the liberal professions. This is considered a matter of administrative law, not of substantive civil, criminal, or commercial law, hence it rests with the states, and their regulations requiring academic degrees or other examinations of admission to the practice of law, medicine, engineering, etc., have been repeatedly upheld by the supreme court as not violating the liberty of occupation guaranteed by section 24 of this article 72.[1] On the other hand, some states have gone to the opposite extreme of writing into their own constitutions the prohibitions which their representatives in the constituent congress could not succeed in having inserted in the federal constitution, decreeing a liberty of occupation which does not permit of restrictions in favor of academic degrees or other proofs of fitness.[2] Such provisions have been attacked as unconstitutional on the ground that they violated the constitutional principles of the Union, the respect of which by the states is decreed by article 63 of the constitution.[3] But, however deplorable such a condition of affairs may be, the right to regulate the conditions of admission to the practice of the liberal professions would seem necessarily to include the right to dispense with all regulation.

The penal code makes it a punishable offense, under the title of "Crimes against public health," to practise medicine in any of its branches, dentistry, pharmacy, homeopathy, hypnotism, or animal magnetism, without being qualified under the laws and regulations, and expressly forbids spiritualism, magic, sorcery, talismans, and divination as means of cures.[4]

Closely related to the question of the liberty of engaging in the professions of law, medicine, engineering, etc., is the question of the liberty of the teaching profession. This seems clearly to fall within the terms of the section (24) we have been considering, but it is worthy of note that it was not expressly mentioned in the draft of the provisional government, nor incorporated in the constitution, though the draft of the commission of 5 included among the fundamental rights (art. 89, sec. 4) that "all may freely learn and teach, or

[1] See Kelly, Octavio, *Manual de Jurisprudencia Federal*, 2d Supplement (Rio de Janeiro, 1920), p. 168.

[2] On September 25, 1896, the president of the state of Espirito Santo, for instance, decreed that no official proof of fitness should be required of any citizen for the free exercise of any intellectual, moral, or industrial profession. Cited in Milton, *A Constituição do Brazil*, p. 425.

[3] Milton, *A Constituição do Brazil*, p. 425.

[4] Penal Code, arts, 156, 157.

establish institutions of instruction." The right of the state to establish a public educational system and to make instruction free and compulsory does not contravene the freedom of instruction, nor does the inspection and supervision of private institutions that ask to be recognized as on a par with the former.

Likewise falling within the terms of this article of the declaration of rights are the questions relating to labor and social legislation that impose restrictions in the exercise of the police power on the freedom of labor and of contracts, as well as the questions of monopolies, labor-unions, and the right to strike.

The penal code (arts. 204–206), under the title of "Crimes against the freedom of labor," defines and punishes as crimes the restraining or preventing of anyone from engaging in his industry, commerce, or business, from opening or closing his places of work or business, and from working or refraining from work on given days. It is also made a crime to induce, by threats, coercion, or false representations, workmen or laborers to leave the establishments in which they are employed, or to cause or provoke the cessation or suspension of work in order to impose on employees or employers increases or diminutions of work or wages. The right to strike is guaranteed by these provisions, and even the right to request others to join a strike is not forbidden by these provisions of the penal code, as that flows from the right to form unions, a right especially recognized by law of January 5, 1907. But although the decisions of the United States courts on cases relating to labor legislation have been cited with approval, the constitutional questions of that nature have not been raised as yet in Brazil, because there has been very little done in that direction. This is regarded in Brazil as falling within the jurisdiction of the federal government, as part of the substantive commercial law.[1]

Monopolies are in general regarded as forbidden by this provision with regard to liberty of occupation, as well as contrary to the general spirit of the constitutional system; but this prohibition does not prevent the government from adopting, with regard to certain services of general interest, such as the furnishing of electric power, the device which is of the greatest advantage to society in general, be that device free competition or a monopolistic or exclusive concession.[2] The reasoning of such cases would seem to extend to all manner of public utilities that are natural monopolies.

LIBERTY OF ASSOCIATION AND REUNION.

Section 8 of article 72 declares that it is permitted to all to form associations and to assemble freely and without arms, the police being forbidden to interfere, except to maintain public order. This liberty

[1] Araujo Castro, *op. cit.*, p. 385.
[2] Accórdão, No. 1,830, of May 12, 1915. Cited in Araujo Castro, *op. cit.*, p. 252.

of assembly was not expressly guaranteed by the constitution of the empire, but the penal code of 1830 and supplementary laws of the empire recognized and protected this right. In all the preliminary drafts of the constitution of 1891 this liberty was expressly guaranteed, and the present provision is a *verbatim* reproduction of the draft constitution promulgated by the provisional government in 1890.

The penal code of October 11, 1890, decreed by the provisional government before the meeting of the constituent assembly and still in force, defined and made punishable the crimes of sedition and illegal assembly. The first consists of the reunion of more than twenty persons who assemble, even if not all armed, with uproar, violence, or threats, to interfere with the exercise of a lawful power by a public official, or to perpetrate any act of hatred or vengeance against public officials or members of the national, state, or local legislative bodies, or to interfere with the execution of any judicial act or sentence, or to embarrass the collection of any lawful tax, or to restrain or disturb any public body in the exercise of its functions.[1] The second consists of the meeting of more than three persons in any public place, with the intention of aiding each other, by means of uproar, tumult, or disturbance, to commit any crime, to prevent or impede anyone in the enjoyment or exercise of a right or duty, to commit any act of hatred or contempt against any citizen, or to disturb a public reunion or celebration of a civic or religious festival.[2]

But the code expressly declares that the crimes of sedition and unlawful assembly therein defined do not include the orderly assembling of the people without arms for the purpose of protesting against injustice, or vexatious or improper procedure on the part of public employees, nor do they apply to the peaceable and unarmed reunion of the people in public squares, theaters, or other convenient buildings or places in order to exercise the right of discussing and making representations with regard to public affairs. For the exercise of this right it is expressly stipulated that a prior license from the police authorities is not required, and that the latter may only prohibit the announced assembly in the case when the constitutional guaranties are suspended, their action even then being limited to a dissolution of the assembly, the formalities of the law being observed under the penalties contained therein.[3]

By law No. 30, of January 8, 1892, the president of the republic was made responsible before the impeaching power for the prevention, disturbance, or dissolution of the peaceful assemblages of the people, save in the cases permitted by law and with the formalities prescribed therein. In the exercise of the privilege to interfere with public meetings for the maintenance of public order the police enjoy a power and a duty which are not consistently or clearly defined by the supreme

[1] Penal Code, art. 118. [2] *Ibid.*, art. 119. [3] *Ibid.*, art. 123.

court. In a case decided in 1917,[1] the court held that the police had power to localize the meetings by indicating the place or places where they might be held, and to prohibit them whenever they had adequate grounds to fear that public order would be disturbed or when the purpose of a meeting was manifestly criminal. In such cases the promoters of a meeting may invoke the remedy of the *habeas corpus*, the court then entering into the question whether the grounds alleged by the police were sufficient to justify their action.

Against this decision, Ruy Barbosa protested in the federal senate on the ground that it adopted the policy of prevention, forbidden by the constitution, instead of the policy of repression, which limits itself to holding persons responsible for acts performed in the abuse of their liberties. Thereupon, in a similar case decided in 1919, the supreme court reversed its position and denied the power of the police to designate the place in which the meeting shall be held.[2] On this point there is a difference of opinion among Brazilian jurists at the present time.[3] There is also a difference of opinion as to whether the right of assembly for the discussion of political questions is restricted to Brazilian citizens because of its character as a political right, or whether it is, as article 72 expressly declares, a right guaranteed to Brazilians *and to foreigners resident in the country*.[4]

Of the right of association, *i. e.*, of forming associations as distinguished from the right of assembly, little need be said. Though guaranteed by the constitution, it may be and is subjected to the restrictions imposed by the civil and commercial codes, the former dealing with civic societies, which must be registered, and the latter dealing with commercial associations or societies.

THE RIGHT OF PETITION.

Closely allied to and, indeed, included within the concept of the liberty of speech is the right of petition, which, however, is also expressly guaranteed in the constitution of 1891 in the following terms:

> ART. 72, Sec. 9. It is permitted to anyone whosoever to make representations by means of petition to the public powers, to denounce abuses of the authorities, and to enforce the responsibilities of the guilty.

The constitution of the empire contained a similar guaranty, but, as has been pointed out before, the right was under that constitution guaranteed to citizens only. Under the republican constitution there seems to be no ground for nullifying the express extension of this right, along with the others contained in article 72, to foreigners resident in the country. It is a right which is freely exercised in practice

[1] Accórdão No. 4,313, of July 11, 1917. Cited in Araujo Castro, *op. cit.*, p. 237.
[2] Accórdão of April 5, 1919. Cited in Araujo Castro, *op. cit.*, p. 239.
[3] Araujo Castro, *op. cit.*, pp. 239, 240. [4] See ante, p. 132.

and appears not to have suffered restriction by the authorities, at least not in such manner as to be brought before the courts. There is no indication that the right of petition involves the right to action thereon, or even to acknowledgment thereof, though without that the right of petition may of course remain wholly illusory. But it must be recalled that in Brazil there is not only a broad civil liability of officers for illegal acts, but also that the liability of the state itself is recognized to a wide extent.

PROPERTY RIGHTS.

The constitution declares, in section 17 of article 72, that the right of property is preserved in all its fulness, saving the right of expropriation for public necessity or utility, in virtue of prior indemnification. Mines belong to the owners of the soil, saving the limitations established by law in the interests of the development of this branch of industry.

The constitution of the empire already guaranteed the right of property in the same terms, a decree of May 21, 1821, antedating the imperial constitution and even the declaration of independence, having already established the security of private property as one of the principal bases of the social compact, and absolutely requiring prior agreement as to price and payment at the time of taking possession in case of expropriation for public purposes. With regard to the rights in mines, however, the constitution of the empire was silent, and it was commonly supposed and maintained that the ancient ordinances of Philip I (Philip II of Spain), promulgated in 1603, were in effect, by which mines belonged to the king, in spite of the comprehensive terms of the guaranty in the constitution of 1824. As late as 1866 the imperial council of state pronounced in favor of the continued existence of the *direito real* in the mines, though prominent jurists combated this opinion. The controversy was finally put definitely to rest by this provision of the constitution, a paragraph added by amendment on the floor of the constituent congress.

With respect to the right of expropriation, a process regulated by a large number of successive laws and decrees under the empire, the civil code that went into effect on January 1, 1917, treated of expropriation as one of the ways in which property in real estate can be lost.[1] By the provisions contained therein four cases of public necessity are enumerated: (1) defense of national territory; (2) public security; (3) public assistance in case of calamity; (4) public health. In addition, four cases of public utility are enumerated: (1) the settlement of towns and location of institutions of public aid, education, or instruction; (2) the opening, widening or extension of streets, plazas, canals, railroads, or public highways in general; (3) the con-

[1] Civil Code, arts. 590, 591.

struction of works or establishments destined for the general good of a locality, its beautification, and its sanitation; (4) the development of mines. In case of imminent peril, such as war or internal commotion, the competent authorities may make use of private property to the extent required for the public good, the owner being guaranteed the right of subsequent indemnification. In all other cases the owner must be indemnified beforehand, or, if he refuses the indemnity, the value must be determined judicially.

The right of expropriation resides for their respective needs in the federal government, in the state governments, and in the local governments, or in public-service undertakings authorized for the purposes enumerated above. The detailed regulation of the process of expropriation is left to the states with regard to the measures undertaken by them, as this is regarded as a matter of administrative rather than substantive law. But the states can not authorize expropriation for any other purpose than those enumerated above, there being no legal distinction, moreover, between the cases of public necessity and those of public utility. So far as expropriation by the federal government is concerned, the process is regulated by a decree of September 9, 1903,[1] promulgated in virtue of law No. 1,021, of August 26 of the same year. This decree limits the indemnity to fifteen times the rental value of the property.[2]

The right of expropriation, though applied commonly to real estate, is capable of application to other forms of property as well, the Union being authorized to expropriate public property of the states or municipalities. Brazilian jurists even contend that the states may expropriate federal property when necessary for public purposes.

With reference to the limitations which the law may establish on the right of the proprietor to the subsoil, in the interests of the development of the mines, a constitutional question has arisen that has already been noted in another connection. It is just another phase of the question what the extent of the legislative jurisdiction of the Union is, under the power to legislate, on the civil, commercial, and criminal law of the republic. If the regulation of rights of exploration and development of mines belongs to the substantive law, it falls within the jurisdiction of the Union. If, however, it belongs to the realm of administrative law, it falls to the states. The national chamber of deputies in 1891 held that the regulation of this matter belonged to the states, the Union having power only over mines situated within its own public lands, but Barbalho maintains that it falls within the general power of the Union over substantive law. In this sense also is law No. 2933, of January 6, 1915, dealing with mines in general as well as with those under the direct control of the Union.

[1] Decree No. 4,956.

[2] A feature of doubtful constitutionality. See Araujo Castro, *op. cit.*, p. 220.

But the civil code limits itself to declaring that the ownership of the soil includes everything above and below it, of use in its enjoyment, the owner not being permitted, however, to object to works undertaken at such a height or at such a depth that he has no sort of interest in preventing them.[1] Araujo Castro contends, therefore, that the restriction of the right of the owner of the soil in the subsoil is a matter for state legislation.

PATENTS.

Aside from the general protection accorded to the right of property by the provisions considered above, the constitution accords especial protection also to inventions, literary and artistic works, and trademarks.[2] These are monopolistic property rights distinct from the ownership in things, and their guaranty in the constitution is a protection not afforded in our own constitution, where the congress is merely given power to secure, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.

Patent rights were accorded constitutional protection in Brazil already under the imperial constitution, which assured to inventors the property in their discoveries or productions, guaranteeing that they should be accorded a temporary exclusive privilege or a payment in compensation for their loss if made public property.[3] This provision was made effective by law of August 18, 1830, and by provisions of the penal code of 1830. Then in 1882 a comprehensive law with regulating decree was passed,[4] which, with a few insignificant modifications, is the law on the subject to-day. The preliminary drafts of the republican constitution did not reproduce this feature of the imperial constitution, but the committee of 21 of the constituent congress added it as an amendment to the provisional government's draft, and this addition was accepted by the congress. The protection of inventors' rights by legislation was not one of the matters enumerated in the powers of the national congress, but it seems to be assumed that this is a matter which falls within the domain of substantive law and therefore falls within the exclusive jurisdiction of the federal government, aside from the fact that it forms the subject matter of international convention.[5] On its face, however, it would seem to belong rather to the field of administrative

[1] Civil Code, art. 526.

[2] Constitution of Brazil, art. 72:

Sec. 25. Industrial inventions shall belong to their authors, to whom the law shall accord a temporary monopoly, or a reasonable premium shall be granted by the congress when there is a desirability of making the invention general property.

Sec. 26. To authors of literary and artistic works there is guaranteed the exclusive right to reproduce them in print or by any other mechanical process. The heirs of the authors shall enjoy this right for the time determined by law.

Sec. 27. The law will also assure the right of property in trade-marks.

[3] Constitution of the Empire of Brazil, art. 179, XXVI.

[4] Law No. 3,129, of October 14, 1882, and decree No. 8,820, of December 30.

[5] See Araujo Castro, *op. cit.*, p. 225.

law, and with regard to the second reason advanced, that would apply equally well to the subject of admission to the practice of the liberal professions, which, none the less, is left to regulation by the states.

The Brazilian patent law of 1882 adopts as its basic principle the free concession of patents, leaving it to the courts to decide, in case of controversy, whether the patented article falls within the protection accorded by the law. The protection afforded by the patent law in Brazil extends over a period of fifteen years. As regards the protection of foreign patents in Brazil, that country has adhered to the international patent conventions of 1883 and to the Washington convention of May 1911 for the protection of industrial property, as well as the Pan-American convention of Buenos Aires of August 20, 1910.[1]

COPYRIGHTS.

The constitutional protection of copyrights was new in the republican constitution, though the criminal code of 1830 under the empire had accorded protection to authors for their works during their lives and for 10 years longer in the interest of their heirs (art. 261). The penal code of the provisional government, of October 11, 1890, continued the same terms (arts. 345–350), and the law of August 1, 1898, established a term of fifty years for the reproduction of the original and of ten years for translations, representations, or performances. The civil code of 1917 protected the authors of literary, scientific, or artistic works (enlarging, therefore, the concept of the constitutional guaranty, which referred only to literary and artistic works) during their lifetime and their heirs for sixty years thereafter.[2] This provision did not incur the suspicion of unconstitutionality which was directed against the law of 1898, on the ground that section 26 of article 72 of the constitution in express language guarantees to authors without limit the right of reproduction, etc., that is, during their lifetime.

The law provides for registration of the works, a formality which creates a presumption of ownership for the registrant, but which is not a condition of the enjoyment of the author's exclusive privilege. By decree No. 11,588, of May 1915, Brazil put into force the terms of the convention of Buenos Aires of 1910, which extended the copyright protection to the owners of copyrights in other countries, without any other formality than that of indicating in the work itself the reservation of rights. To the authors of works in other countries copyright protection is extended on the basis of reciprocal treaties, such as those concluded with France and with Portugal.[3]

[1] See Borchard, Edwin M., *Guide to the Law and Legal Literature of Argentina, Brazil, and Chile* (Washington, Government Printing Office, 1917), p. 267.

[2] Civil Code, art. 640.

[3] Borchard, *op. cit.*, p. 265.

TRADE-MARKS.

The protection guaranteed to trade-marks by section 27 of article 72 of the Brazilian constitution is less definite than that accorded to authors, for it states merely that the law shall assure property in trade-marks. This, also, is an innovation in the republican constitution, but a law of the empire of 1875 dealt with the matter, supplemented by the law of October 14, 1887, amended and superseded under the republic by law No. 1,236, of September 24, 1904. This law requires registration of the trade-mark, which, if legitimate, protects the same for the period of fifteen years, establishing at the same time penalties for the violation of trade-marks. A decree of January 10, 1905, amplified and supplemented the law of 1904 in various particulars. It is a curious characteristic of the Brazilian law, however, that the registration and deposit of the trade-mark are made with the board of commerce of the various states, instead of requiring registration and deposit in a federal office.

Foreign trade-marks are protected in Brazil by virtue of various decrees putting into force the conventions of Madrid, of April 14, 1891, and later modifications, and especially by decree No. 11,385, of December 16, 1914, adhering to the acts of the Washington agreement of June 2, 1911, with reference to the acts of the International Union for the Protection of Industrial Property, and decree No. 11,588, of May 19, 1915, promulgating the conventions on this matter signed at the fourth Pan-American conference in Buenos Aires in 1910.

INVIOLABILITY OF THE DOMICILE AND OF CORRESPONDENCE.

"The home is the inviolable asylum of the individual; no one may enter therein at night without the consent of the inmate, unless to aid the victims of crimes or disasters, nor by day save in the cases and in the manner prescribed by law." So decrees section 11 of article 72 of the constitution, repeating the almost identical provisions of the constitution of the empire in that regard.[1] The criminal code of the empire (arts. 209–214) defined the cases in which forcible entry into houses was permitted and established penalties for violation of the same. The code of criminal procedure of 1832 defined the method of search and the issuance of search-warrants (arts. 189–192). The penal code of October 11, 1890, reproduced the same safeguards (Book II, Title IV, Ch. V), permitting entry at night only in case of fire, immediate and imminent ruin, flood, cries for assistance, or if a crime or violence is being committed therein against anyone. Entry by day is permitted in the cases in which it is permitted by night, and in those in which, in conformity with the laws, the arrest of a criminal is to be accomplished, or the search or apprehension of things secured by criminal means, the investigation of instruments or evidence of

[1] Art. 179, VII.

crime or contraband, the seizure or sequestration of hidden goods, or in case of *flagrante delicto* or pursuit of an offender discovered *in flagrante*. With the exception of the last-mentioned case and of those that justify entry at night, a written warrant from the competent authority must be shown, and an official of the courts must accompany the act with two witnesses.

Similar protection is extended to the secrecy of correspondence by section 18 of article 72, which declares that the secrecy of correspondence is inviolable, a protection more ample than that accorded by the constitution of the empire, which protected only letters in the post, not telegrams or private correspondence. The penal code of 1890 amplifies and penalizes the crimes against the secrecy of correspondence (Book II, Title IV, Ch. IV), prohibiting not only the admission of information improperly obtained as evidence in judicial cases, but making punishable the use of letters or telegrams even for the discovery or proof of a crime. In spite of the broad terms of the constitutional protection and the prohibitions of the criminal code, the law permits the opening of letters in special cases, such as those of a bankrupt, and the right of prison authorities to open the correspondence written by or directed to the inmates.

MISCELLANEOUS INDIVIDUAL GUARANTIES.

Of the other individual guaranties contained in Title IV, Section II of the constitution it is not necessary to make special mention, either because they are not, strictly speaking, civil rights, as, for instance, the one (sec. 74) guaranteeing the security of life offices, or because they refer to a special class, such as those of articles 76 and 77, relating to the military and naval forces. This comprehensive declaration of rights, opening with the broad declaration that no one may be obliged to do or to refrain from doing anything except by virtue of a law (sec. 1), declaring that all are equal before the law (sec. 2), enumerating all the specific guaranties already considered, and determining that no tax of any kind may be laid except by virtue of a law that authorizes it (sec. 30), closes with a paraphrase of our ninth amendment:

ART. 78. The specification of guaranties and rights expressed in the constitution does not exclude other guaranties and rights not enumerated but resulting from the form of government established by it and from the principles which it enunciates.

CHAPTER VII.

SUSPENSION OF CONSTITUTIONAL GUARANTIES.

STATE OF SIEGE.

The preceding chapter has shown that, in the detailed enumeration of individual liberties, in their complete parity for foreigners as well as for citizens, and in their application in every respect to state governments as well as to the Union, the federal constitution of Brazil goes even further than that of the United States of America. It now remains to consider a peculiar institution of Brazilian constitutional law which presents the theoretical possibility and the practical reality of restraining this broad grant of constitutional guaranties within narrower limits than occurs under our own system. This peculiar Brazilian institution is the so-called "state of siege," the origin and spirit of which are European rather than American, and the constitutional basis and practical application of which present at the same time one of the most disputed and one of the most striking phases of Brazilian constitutional practice.

This interesting and far-reaching institution of the "state of siege," sanctioned in virtually all of the Latin-American constitutions, is an outgrowth of, not to say an excrescence upon, the modern *régime* of written constitutions, with their formal enumeration of the fundamental rights of man. In the American state constitutions of the Revolutionary period and in the federal constitution of 1787, however, the first formal constitutions to guarantee these individual liberties, no mention was made of any such restrictive measures with regard to these rights. The constitution of the United States restricted itself to recognizing in indirect terms the possibility of adopting exceptional measures by declaring that the privilege of the writ of *habeas corpus*, the great bulwark of personal liberty in England and America, should not be suspended, unless when in cases of rebellion or invasion the public safety might require it (art. 1, sec. 9, par. 2).

But the Latin-American constitutions that were framed early in the nineteenth century, though following the American model in so many respects, departed from the prototype in this important matter, and adopted the language of the law of July 10, 1791, enacted by the constituent assembly in France. This law in effect created a state of war under which all the ordinary practices of civil government were suspended, and the plenary powers lodged in the hands of the government under this "state of siege" proved a desirable weapon in the hands of later governments in France, whether republican or monarchical, against reactionary or radical revolutions, as the case might

be. As such it has been retained in the legislation of the Third Republic (law of Apr. 3, 1878), and as such it found its way into most of the nineteenth-century constitutions of Europe, the impetus for which emanated from the French Revolution. For the absolute monarchies that were compelled by Napoleon or by the force of events to grant constitutions in the first part of the nineteenth century, the "état de siège" provided a sort of back door by which extreme measures could be taken, not only when the country was threatened from without, but also when the country, and more particularly the crown, was threatened by disturbances from within. It was by this route that the institution of the "estado de sitio" came to occupy a place in the Latin-American constitutions of the nineteenth century, in place of the simple American formula permitting the suspension of the writ of *habeas corpus* in cases of rebellion or invasion when the public safety might require it.

Very little, if anything, has ever been written in explanation of this fundamental variation from our own constitutional practice. On the contrary, it is not uncommon to find statements among Latin-American jurists to the effect that the "estado de sitio," consecrated in the constitutions of those countries, is in effect a mere paraphrase of our suspension of the writ of *habeas corpus* clause. Such a view has been advanced by Brazilian jurists also.[1] But the divergencies in the theory and practice of the "estado de sitio," when compared with the American constitutional provision in question, will seem less strange when this diversity of origin is remembered.

Especially in Brazil, perhaps, it is quite apparent that the provisions of the constitution relating to the state of siege had no connection with the *habeas corpus* clause of the American constitution. For the imperial constitution of 1824, though not using the term "estado de sitio," provided for the suspension of certain of the formalities guaranteeing individual liberty, and at the time this first constitution was decreed the writ of *habeas corpus* was unknown in Brazil. The suspension of constitutional guaranties could obviously, therefore, not have been inserted in imitation of a measure which had no counterpart in the jurisprudence of the country.

So controversial has been the subject of the state of siege in Brazil, both in the field of pure theory and in the actual practice, with the resulting justifications and criticisms, and so important is the matter from a constitutional and political standpoint, that some space must be devoted to its origin and development.

Prior to March 25, 1824, there were no constitutional rights to be either guaranteed or suspended, since there was no constitution,

[1] See Barbalho, *op. cit.*, p. 120: "The intent [of the Brazilian provision with regard to the grounds for declaring a state of siege] was assuredly the same [as that of the American provision regarding the suspension of the *habeas corpus*] and the measures sanctioned can not assume a larger orbit here than there."

though King João VI, by decree of February 24, 1821, accepted and swore allegiance to the constitution then still in process of elaboration by the revolutionary Cortes of Portugal, and on April 21, 1821, signed a decree putting into effect provisionally in Brazil the Spanish constitution of 1812. But these decrees, as well as the one of Dom Pedro himself later in 1821, accepting the basis of the Portuguese constitution proclaimed in Lisbon on March 9, were annulled by the movement for Brazilian independence which broke out in the next year.

The constituent assembly which met on May 3, 1823, in response to the decree of the emperor, though dissolved by the latter on November 23 without terminating its labors, laid the basis for much that was subsequently inserted into the constitution of 1824 by the committee appointed by the emperor. Among the features of its draft constitution was a chapter, dealing with the individual rights of Brazilians, which forbade the suspension of those rights save as specified in articles 27 and 28.[1]

ART. 27. In cases of declared rebellion, or invasion by enemies, if the security of the state demands that some of the formalities that guarantee individual liberty be suspended for a fixed time, this may be done by special act of the legislature, for the consummation of which a two-thirds vote shall be required.

ART. 28. The period of suspension having expired, the government shall render a justifying report on the imprisonments; and whatever authorities shall have ordered their execution shall be responsible for the abuses practised in this respect.

In view of the later elaborations of this phase of the Brazilian constitution, the remarkable feature of the above provisions was not that they sanctioned the suspension of the personal guaranties, a familiar characteristic of the then recent European constitutions, but that the right of suspension was recognized in such restricted terms. The internal events that could serve as justification for this extraordinary action had to be not merely rebellion but open or declared rebellion. Not the constitution, nor even the individual rights under the constitution, could be suspended, but only some of the formalities that guaranteed individual liberty could be suspended for a fixed time if the security of the state demanded it. And not only was the legislature the only organ that could authorize such suspension, but a two-thirds vote of that body was required for that purpose.

Quite different were the stipulations of the constitution drawn up by order of the emperor after his dissolution of the constituent assembly. In article 179, XXXV, of the constitution of 1824 the adjective "declared," which modified the kind of rebellion that justified this suspension, was omitted, the requirement of a two-thirds vote of the legislative body was dropped, and it was provided that in case the legislature were not in session the government could exercise this power if the country were in imminent peril. It stipulated, however,

[1] *Annaes da Assemblea Constituinte de 1823*, Vol. V, pp. 12, 13.

that such a measure should be indispensable and provisional and should be suspended immediately upon the cessation of the urgent necessity that prompted it. It repeated, moreover, the requirement that the government must give an account to and justify before the next assembly the acts of imprisonment and other measures of repression taken by it, making the authorities responsible for the abuses practised in the exercise of this power.

During the empire the actual power exercised by the executive was in general so comprehensive that a formal suspension of the individual liberties in conformity with the constitutional provisions was seldom necessary for the accomplishment of its purposes. And yet on various occasions in the troubled years of the regencies (1831–1840), and in the first years of the reign of Dom Pedro II, legislative acts and executive decrees on more than one occasion expressly suspended the provisions of the constitution relating to the arrest and trial of offenders.

With the overthrow of the empire and the first steps toward the formation of a republican constitution, no question was raised as to the reincorporation of provisions permitting the suspension of the constitutional guaranties along the lines laid down in the imperial constitution. Here appears for the first time the use of the term "estado de sitio," the declaration of which was included among the powers of the congress and of the executive in the first draft constitution prepared by the commission of five appointed in December 1889 by the provisional government. With but few verbal changes the draft constitution of the provisional government adopted the suggestions of the commission of five, and in the constituent congress no opposition developed against the provisions relating to the state of siege, only one or two minor changes in diction being made. As these provisions are found in three different parts of the instrument, not always, moreover, employing identical terms, and as a good part of the controversy that has raged about the application of these provisions relates to the language employed in the constitution, it seems desirable to collocate the various references here at the beginning of the presentation.

ART. 34. It belongs exclusively to the national congress:

Sec. 21. To declare in a state of siege one or more points of the national territory, in the emergency of aggression by foreign forces or of internal commotion, and to approve or suspend the siege which may have been declared by the executive power or his responsible agents, in the absence of the congress.

ART. 48. It belongs exclusively to the president of the republic:

Sec. 15. To declare, himself or by his responsible agents, the state of siege in any portion of the national territory, in cases of foreign aggression, or grave internal commotion (art. 6, sec. 3; art 34, sec. 21; and art. 80).

ART. 80. Any part of the territory of the Union may be declared in the state of siege, the constitutional guaranties being there suspended for a definite time, when the security of the republic requires it, in case of foreign aggression or internal commotion (art. 34, sec. 21).

Sec. 1. The congress not being in session, and the country experiencing imminent danger, the federal excutive power will exercise this attribute (art. 48, sec. 15).

Sec. 2. This authority, however, during the state of siege will limit itself, in taking measures of repression against individuals, to imposing:

1. Their detention in a place not intended for those guilty of ordinary crimes;
2. Their banishment to other locations in the national territory.

Sec. 3. Immediately upon the reassembling of the congress, the president of the republic will report to it, with his grounds therefor, the measures of exception which may have been taken.

Sec. 4. The authorities which shall have ordered such measures are responsible for the abuses committed.

The state of siege thus authorized by the constitution of the republic was declared for the first time on November 3, 1891, less than nine months after the adoption of the constitution, by President Deodoro da Fonseca. The first legislative decree of the state of siege was enacted on April 10, 1893, and the most recent application of this measure was in 1922, when the National Congress, upon request of President Pessoa, decreed a state of siege on July 5 in the federal district and the state of Rio de Janeiro, extended on two occasions, and still in force at the date of writing.[1] On the numerous occasions on which it has been applied (1891, 1892, 1893, 1894, 1897, 1898, 1905, 1910, 1914, 1917, 1918, 1922) such various conditions have been presented as regards the authorities that declared the measure, the grounds on which it was decreed, the length of time during which it was in force, the geographical extent of its operation, the measures adopted thereunder, and the legal consequences flowing therefrom, that it is almost impossible to derive any general conclusions from an examination of the precedents, especially as there were marked and bitter differences of opinion in the commentaries made upon each case.[2] For that reason, the main features of the process will be examined in the light of the main commentators on the constitution.[3]

The first point worth noting is that the declaration of the state of siege is purely a federal measure; that is, the states have no power to suspend any of the constitutional guaranties. Barbalho deduces this conclusion from the fact that the declaration of the state of siege is enumerated among the powers which by art. 34 belong exclusively to the congress. It would seem to follow, moreover, from the simple fact that the federal constitution imposes the limitations of the declaration of rights upon the states as well as upon the nation, and that, therefore, the states have no power to suspend any of these guaranties

[1] June 1923.

[2] An exhaustive collection of material bearing on the state of siege as discussed in the national congress is to be found in the series of *Documentos Parlamentares, Estado de Sitio*, issued by the congress.

[3] See especially Milton, A., *A Constituição do Brazil*, pp. 150–164, 249, 250, 457–480; Barbalho, J., *Constituição Federal Brazileira*, pp. 118–125; Araujo Castro, *Manual da Constituição Brasileira*, Ch. XXVIII.

unless expressly authorized thereto. Under the *Acto Addicional* of 1834, however, amending the imperial constitution in the direction of greater powers for the provinces, the provincial legislative assemblies were given power to exercise the right of suspending the constitutional guaranties within their limits, cumulatively or concurrently with the central government.[1] Perhaps it was this fact that prompted the insertion, in several of the early state constitutions, of provisions authorizing the state legislatures to suspend the individual guaranties in case of rebellion or invasion. Though later eliminated in some of the states, it is still found in at least two of them, in plain contravention of the federal instrument.[2]

The first question that naturally arises in connection with this extraordinary measure, and the one which affects fundamentally the whole character of its rôle in the government and politics of the country, is, "Under what conditions is it to be employed?" On this point the constitution employs the following terms: "in the emergency of aggression by foreign forces or of internal commotion" (art. 34, sec. 21); "in cases of foreign aggression or grave internal commotion" (art. 48, sec. 16); "when the security of the republic demands it, in case of foreign aggression or internal commotion" (art. 80). From these various expressions it is clear that only a very unusual situation would justify the employment of this extraordinary measure. As regards foreign aggression, there has not been much discussion, both because the case is one that is rarely presented and because the danger of abuse is manifestly less when foreign invasion or aggression clearly puts the safety of the country in danger. But the interpretation of the phrases with regard to internal commotion has been varied. Theoretically, there seems to be virtual unanimity in the view expressed by Ruy Barbosa,[3] that the internal commotion in question, standing, as it does, in intimate juxtaposition with foreign aggression as a ground for the state of siege, must be evidenced by disturbances which are analogous in gravity to those that accompany the presence of an enemy in the country. In other words, the authoritative commentators of the Brazilian constitution would limit the case of declaring the state of siege to the circumstances under which in the United States the writ of *habeas corpus* may be suspended, under the restrictions indicated in the famous *Ex parte Milligan* case, a case repeatedly quoted in Brazilian discussions of this matter. All the commentators agree in declaring that the state of siege may be declared only when absolutely necessary. Contrary to the opinions of Argentine authorities, they contend that it can not be invoked as a preventive but only as a repressive measure, and as it is a measure of political character

[1] *Acto Addicional*, art. 11, sec. 8.
[2] Castro Nunes, *As Constituições Estaduaes do Brasil*, p. 89.
[3] *O Estado de Sitio*, etc., quoted in Barbalho, *op. cit.*, p. 120.

it can not be invoked when the disturbance results merely from an unusual number of ordinary crimes. Criticizing the frequency with which resort is had to this measure in certain countries, not mentioning Brazil by name, Milton, writing in 1898, when its employment in Brazil had been restricted to six rather clear cases, quoted with approval from an opinion of the United States supreme court the declaration:

> When it becomes necessary, in order to save a country governed by free institutions, to make frequent sacrifice of the fundamental principles which insure the rights of man, the country is not worth saving.

Opposed to these rather uniform and consistent principles with regard to the justification of the state of siege on the part of authoritative commentators has been the practice of the Brazilian government, including both the executive and the legislative branches, in the exercise or sanction of this extraordinary measure. Certain of the numerous invocations of this power, especially those in the troubled years of the formative period, 1891 to 1894, have, in general, received approbation. But in many of the instances since that time, though the government was of course careful to recite that the internal commotion existing was of the kind contemplated by the constitution, there has been serious question, at least, whether the circumstances required this extreme measure. It has already been pointed out that the state of siege has been designated as a measure of a political character, a characteristic which the supreme court has accorded to it when refusing to interfere by examining into the facts which were alleged in justification thereof,[1] and the allegation principally made against its use or abuse in Brazil is that it has been used as a weapon of personal or factional politics. Especially in view of the censorship of the press, which is, as will be seen, one of the weapons put at the disposal of the government by the declaration of the state of siege, there is offered a tremendous temptation to a government to resort unnecessarily to this extreme in order to muzzle the opposition press.

Among the recent commentators of the Brazilian constitution, none is more bitter in his denunciation of the use made of the power to declare a state of siege than Dr. Silva Marques, a native of the state of Rio de Janeiro, to which the restrictions of this extraordinary power have been applied more frequently, perhaps, than to any other state in the Union. In speaking of the constitutional grounds for declaring the state of siege, he says:[2]

> Now, the truth is that all the states of siege, save in the period of Marshal Floriano, have been decreed in virtue of disturbances provoked by the police at the command of the government itself.

[1] Accórdão No. 3,556, of June 10, 1914. Quoted in Araujo Castro, *op. cit.*, p. 342, n. 2.

[2] Silva Marques, *Elementos de Direito Publico e Constitucional*, 2d ed. (Rio de Janeiro, 1919), p. 322.

The congress has always voted the measure without real cause, through cowardice or subordination to the executive, and the president of the republic, in the absence of the congress, has many times been led to abuse the state of siege by pressure of ministers or advisers anxious to persecute adversaries or to realize with convenience lucrative enterprises without the protest of a free press.

The language is extreme, and the author was smarting under what he considered a recent injury done his native state under the declaration of a state of siege therein by the government of President Hermes da Fonseca. But even with a liberal discount for exaggeration, the opinion presents a bitter arraignment of this constitutional device for dispensing with fundamental, though sometimes inconvenient or even dangerous, constitutional safeguards, and would seem to go far toward justifying the opinion of critics of the institution, that it is an anomaly and contrary to the spirit of liberal institutions.

In the most recent instance of the declaration of the state of siege in Brazil, in July 1922, public opinion seemed to acquiesce in the action of the congress in face of the open revolt of July 5 and 6, but when, long after the disturbance had been effectually quelled, the period was twice prolonged, there was much criticism and widespread expression of opinion that the main purpose of the government was the muzzling of the press. Whether correct or not, such a conviction, on the part of men who had nothing to lose by the continuance of the state of siege and nothing to gain personally by its termination, tends to discredit not only the administration that employs it but the constitution that makes it possible. Coupled, as it frequently is, with the power of federal intervention in the internal affairs of the states, it suffers under all the stigma that is attached to the abuse of that power.

It should be pointed out, however, that although the declaration of the state of siege would manifestly give the national administration a distinct coercive power and opportunity for the exertion of improper pressure at election time, it is not charged that this power has been abused. In fact, so far from declaring a state of siege in anticipation or in view of approaching elections, the government has on more than one occasion suspended the state of siege on election day in order to avoid the suspicion of employing the measure for any such purpose.[1]

Turning now from the consideration of the general basis for the employment of this extraordinary power, we encounter contradictions and paradoxes in many of the other detailed features of its application. On the question of the territorial extent of the state of siege, there seems to be agreement that, unlike the interpretation adopted in the countries of Argentina and Chile, where the constitutional language is much the same on this point as in Brazil, a simultaneous declaration of the state of siege for the whole country is not warranted

[1] See Milton, *op. cit.*, pp. 154, 155.

by the expressions "in one or more points of the national territory" and "in whatsoever part of the territory of the Union." This is not considered admissible even in time of foreign aggression or state of war, and a bill of the chamber of deputies, in November 1917, after the declaration of the state of war between Germany and Brazil, which declared a state of siege throughout the entire territory of the republic, was amended by the senate to authorize the government to declare successively in a state of siege such parts of the territory as the exigencies created by the state of war might demand. In the execution of this power the government on the next day, November 17, decreed the state of siege in the federal district and the five southernmost states of the Union.

With regard to the authority competent to declare the state of siege, the constitution clearly designates the national congress as the proper authority to do so, according to the executive the emergency power in case congress is not in session. The first two instances of the use of the power occurred by act of the president, and on subsequent occasions the state of siege has frequently been declared when the congress was not in session. When the congress declares the state of siege, it is virtually always upon recommendation of the president, though constitutionally it could act on its own initiative, and did so act on November 16, 1917, when enacting war measures after the recognition of the state of war with Germany. The action of the congress, however, may take the form either of the actual declaration of the state of siege, as occurred by act of September 10, 1893, and was proposed in the bill as passed by the chamber of representatives on November 7, 1917, or of a simple authorization to the executive to declare it, as occurred more commonly, and as was done in 1917 by virtue of a senate amendment accepted by the chamber. There is a conflict of opinion on the question whether a declaration of the state of siege by the congress requires presidential sanction, Milton denying the necessity of such sanction and Barbalho affirming it, the same question arising with regard to the congressional suspension or approval of the state of siege declared in its absence by the executive. The question might become acute if ever the president refused to sanction a state of siege declared by the congress or to approve a congressional act suspending an existing state of siege.

There is no difference, as regards its legal effects, between the state of siege declared by the congress or authorizd by it and one declared by the executive in the exercise of his power.[1] Both differ from other measures in that they become effective immediately, not being governed by the ordinary rules with regard to the period with which legislative or executive acts take effect.[2]

In permitting the executive to declare the state of siege in the absence of the congress, the Brazilian constitution follows the practice

[1] Viveiros de Castro, *Estudos de Direito Publico*, p. 478. [2] Accórdão No. 300, of April 27, 1892.

adopted by most of the other Latin-American constitutions and sanctioned also by the laws of France. In many of the other Latin-American countries, however, there is a permanent committee of the legislature, active during the recess of the congress, which must concur with the president in his declaration of the state of siege, and in France the state of siege may not be declared when the chamber of deputies has been dissolved, except in the portions of the country threatened by the invasion of the enemy. Moreover, in France the law requires that if the state of siege is declared when the congress is not in session, the legislature must convene within two days. Barbalho, having doubtless this example in mind, contends that the Brazilian constitution, by giving the congress the power to approve or suspend such a state of siege, demands that it be summoned immediately in extraordinary session, a requirement the mandatory character of which has, however, not been recognized by the executive. In the United States, as is well known, it was long a subject of controversy whether the power to suspend the writ of *habeas corpus* resided in the president or in the congress, with pretty general agreement to-day on the latter view.

If it be conceded that there is any need of the extraordinary power to declare a state of siege, in addition to the war powers and the power to declare martial law, which will be considered a little further on, it would seem logical to grant the power to the executive to declare it in the absence of the congress. If justified at all, it is justified as an emergency measure demanding immediate application for the safety of the country. To compel the president to await the action of a congress called from all the distant parts of the country in special session might easily make the measure inapplicable at the times when most urgent, since uprisings or rebellions would naturally be timed under such circumstances to occur during the recess of the congress. On the other hand, if abuses of this extraordinary power are to occur, they would obviously be facilitated by allowing the president to act alone. For that reason the constitution of Brazil very properly inserted express safeguards against this temptation by requiring that the president in such cases should report to the congress, immediately upon its assembling, the exceptional measures taken, with reasons therefor, and by stipulating that the authorities who may have ordered such measures shall be responsible for the abuses committed.[1] Moreover, the congress, by section 21 of article 34, is expressly given the power to approve or suspend the siege declared by the president or his responsible agents in the absence of the congress. Around these provisions has raged an interesting controversy stimulated by conflicting opinions in the congress itself and in the federal supreme court.

The constitution says the congress shall have power to "approve or

[1] Constitution of Brazil, art. 80, secs. 3 and 4.

suspend the siege" under such circumstances. That would seem clearly enough to mean merely that it permits or prohibits the continuation of the state of siege already declared by the executive and still in effect; hence Barbalho's contention that the congress must be immediately convoked in extra session, as otherwise the executive would have power to declare a state of siege which could last until the next regular session of the congress without the possibility of the latter using the power expressly given it to approve or suspend the same.

By the law of January 8, 1892, which defined the official crimes of the president for which he could be impeached by the congress, it was made such a crime to suspend the constitutional guaranties either when the congress was in session or when in the absence of the same there had been no internal commotion or aggression by a foreign nation (art. 33). On August 5, 1892, the congress passed a resolution approving not the state of siege but the acts of the government practised under the decrees of April 10 and 12 of the same year, when Marshal Floriano Peixoto declared the state of siege. This was long after the state of siege in question had terminated and was passed with the intention of relieving the executive of responsibility for the acts committed. This was quite a different thing from approving the the state of siege itself, which would have meant merely that in the opinion of the congress there were sufficient grounds for exercising this power, the improper invocation of which would have made the president fall within the terms of article 33 of the law of 1892 previously cited. A similar proceeding was followed three years later, when by act of June 13, 1895, the congress approved all the acts practised by the executive and his agents by reason of the revolt of September 6, 1893, nearly two years before, when, on September 10, the president, or, rather, vice-president acting as such, declared a state of siege.[1] This congressional interpretation of the power to approve the state of siege in the sense of legalizing the acts of the executive performed in its application was accepted by Milton, who wrote in 1898.[2]

But in the congress itself, in an opinion of the supreme court, and according to the views of almost all the authoritative commentators of the constitution, this congressional practice of relieving the executive of responsibility by such a bill of indemnity has been repeatedly denounced as out of harmony with the constitution and dangerous to individual rights.[3]

[1] The same method was pursued by law of September 30, 1898, and September 11, 1905.

[2] Milton, *A Constituição do Brazil*, pp. 151, 152.

[3] Viveiros de Castro, *op. cit.*, pp. 480–485. The conclusions voted by the first Brazilian juridical congress in 1908 on these questions are there quoted in the following terms:

"The exceptional measures taken by the president of the republic during the state of siege are not subject to the approval of the national congress.

"But even if they were, such approval would constitute a political judgment which could not delay, much less prevent, the free exercise of the attributes conferred on the other organs of national sovereignty."

The submission by the president of a message to the congress asking for approval of his acts furnishes no such safeguards, it is claimed, as would result from the process of impeachment on definite charges, a process forestalled by this action.

In article 80 of the constitution, which contains the most detailed provisions relating to the state of siege, it is said that the state of siege may be declared "for a definite time." Consequently the declaration of the state of siege commonly recites that it shall continue until a certain date, but it is capable of extension and on frequent occasions has been extended, either by the congress itself or by the president acting under authority of the congress or of his own motion if the congress is not in session. Sometimes it has been declared for a day or two, sometimes for three or four months, with extensions that have carried it over the greater part of a year, as in 1893, and again in 1922. It may terminate by the simple expiration of the period marked upon its declaration or by prior revocation by the congress or by the president. It may even be suspended for a day, as has been done on more than one occasion when election day came during the existence of the state of siege.

It would seem clear that with the termination of the state of siege, in whatever way this termination may occur, the extraordinary measures taken by the government also cease, and that for all persons affected by these measures matters should return to normal, with the fullest guaranty of the individual rights; yet in one of the earliest decisions rendered by the federal supreme court, and embracing the constitutional questions involved in the state of siege, that court held that the cessation of the state of siege does not *ipso facto* involve a cessation of the measures taken under it, which continue so long as the accused are not submitted, as they should be, to the competent judicial tribunals, since otherwise all the measures taken and demanded by the exigencies of such an emergency might be counteracted.[1] But this obvious exaggeration of the effects of the state of siege was rectified in the later opinions of the court,[2] to the effect that with the cessation of the state of siege all the measures of repression taken during it by the executive power also cease. This unquestionably sound view has, of course, resulted in the extension of the state of siege in cases where, under the earlier ruling, it would not have been required.

If there has been uncertainty in theory and vacillation in practice as regards the proper occasions for declaring a state of siege, its just territoral extension, the respective rôles of the congress and the executive in its employment, the period of time for which it should subsist, and the consequences of its cessation, no less uncertain has been

[1] Accórdão No. 306, of 1892. Quoted in Milton, *op. cit.*, p. 155.
[2] Accórdãos of April 16 and May 25, 1898.

the theory and the practice with regard to the effects of the state of siege.

The references in the sections of the constitution that deal with the powers of the congress and of the president speak merely of the power to declare a state of siege, without referring in any way to its effects. It is only in article 80, which follows close upon the enumeration of the individual rights, that the character of the measure is indicated and it is necessary to reproduce the exact text of the references in order to understand the doubts that have arisen:

ART. 80. Any part of the territory of the Union may be declared in state of siege, the constitutional guaranties being there suspended * * * * *"

Sec. 2. He [the executive], however, during the state of siege, will restrict himself as regards the measures of repression against persons to imposing:

1. Their detention in a place not destined for those guilty of ordinary crimes;
2. Their removal to other portions of the national territory.

Under the imperial constitution, which did not employ the term "state of siege," the language of the provision relating to extraordinary measures permissible in time of rebellion or foreign invasion spoke only of suspending "some of the formalities that guarantee the individual liberty," terms that are obviously less comprehensive than those employed in the corresponding article of the present constitution. But this more inclusive language was incorporated in the first draft constitution of the commission of five and was repeated in all the subsequent drafts, following the language of the Argentine constitution in this respect.

Barbalho argues that since the constitution of Brazil speaks, in article 78, of rights *and* guaranties, there is a manifest difference between the two concepts, which must be applied in the interpretation of the language of the article here under consideration, which speaks of the suspension of guaranties but not of rights. Hence he concludes that the provisions of the present constitution are in effect the same as those of the imperial constitution and that its real meaning is the same as expounded by Pimenta Bueno in his book on Brazilian Public Law, p. 609: "The suspension of the constitutional guaranties is not the suspension of the constitution, nor of the rights of citizens, but only of certain formalities that guarantee the individual liberty."[1] Barbalho admits, however, that the Brazilian constitution permits the suspension of any or all of these guaranties, saving only the restrictions imposed in section 2 of article 80, quoted above, limiting the measures that may be taken against persons to detention in a place not destined for ordinary criminals or removal to other portions of the territory.

Saving this exception, which will be examined more fully a little further on, the effect on the individual citizen is obviously much the

[1] Barbalho, *op. cit.*, p. 120.

same as though his rights and not merely the formalities that guarantee those rights were suspended. It is the established doctrine, for instance, that the writ of *habeas corpus,* which is the great safeguard against violations of individual liberty, is suspended by the declaration of the state of siege. No one can appeal, in case of summary arrest without charges, solitary confinement without arraignment, or complaint beyond the 24-hour period stipulated, or other omission of the protections against imprisonment, to the court on the ground that the constitutional bases for declaring a state of siege were not present. That is a political question to be resolved by the executive and the congress, not by the judiciary. But it is one of the peculiar features of this Brazilian state of siege, which is commonly spoken of as the paraphrase in that country's constitution of the provision in our own relating to the suspension of the writ of *habeas corpus,* that under it the writ is not suspended in cases where the executive exceeds the limits imposed by section 2 of article 80 with regard to measures against persons.[1]

If all the constitutional guaranties may be suspended, as Barbalho admits, this means that not only the guaranties of individual liberty, freedom of locomotion, freedom of speech and of the press, right of assembly and association, religious liberty, etc., may be suspended, but also the individual guaranties of property, of the inviolability of the domicile, of correspondence, and of occupation. This view is sustained in the provision of the civil code which authorizes the authorities, in time of war or internal commotion, to make use of private property when required for the public good, the owner being guaranteed the right of subsequent indemnification.[2] But it is obvious that if the state of siege has the effect of suspending the constitutional guaranty of prior indemnity, it would the more clearly have the effect of suspending the guaranty of subsequent indemnity stipulated by the civil code so long as the state of siege continued.

Against this broad interpretation of the effect of the state of siege, more extensive than is recognized in Spain, where the constitution limits its effects to the inviolability of the domicile, of locomotion, of speech and of the press, and of assembly and association, Araujo Castro protests on various grounds.[3] In fact, this gives the government a power which is not recognized in France and other countries in which the state of siege is sanctioned, and which is difficult to reconcile with the fundamental proposition that the effects of the state of siege terminate with its cessation.

Among the most mooted of the constitutional questions revolving about the state of siege in Brazil was that relating to the bearing of the state of siege on the constitutional immunities of members of

[1] Accórdão No. 3,556, of June 10, 1914. Quoted in Araujo Castro, *op. cit.*, p. 347.
[2] Civil Code of 1917, art. 591. [3] *Op. cit.*, pp. 345–347.

parliament, enumerated in articles 19 and 20 of the constitution. If article 80 permitted the suspension of all constitutional guaranties, as its broad terms seemed to indicate, then these immunities of the members of congress, guaranteed by the constitution, would also disappear, and the very body that was intended to serve as a check on the executive, especially in the exercise of these extraordinary powers, would be at the mercy of the same and subject to solitary imprisonment as long as the state of siege should last.

As a matter of fact, beginning with the declaration of the first state of siege, on November 3, 1891, by President Fonseca, until 1898, when the supreme court passed on the question, it was not only the practice but the accepted theory that the declaration of the state of siege subjected the members of the congress to the suspension of their constitutional immunities as members of that body. In 1894 the question was raised in the congress whether the state of siege could be declared with the exception of these articles guaranteeing the parliamentary immunities, thus by implication admitting the propriety of including them if not excepted. The chamber of deputies decided in the affirmative and sent a bill to the senate containing this exception. In the senate, however, an amendment was passed which provided for the suspension of those guaranties along with all others, an amendment which the chamber rejected and which the senate did not insist upon. Again, in 1897, the senate by implication adhered to the view that the state of siege involved the suspension of the parliamentary immunities, though the chamber of deputies had omitted the mention of excepting these particular immunities on the ground that it was unnecessary, since they were not included in the concept of the guaranties that were subject to suspension by the state of siege. Nevertheless, the government, under that state of siege, declared by the congress on November 12, 1897, adopted an opposite interpretation and engaged in the practice of arresting and deporting representatives of the nation without regard to their immunity.[1] This was not surprising, in view of the consistent practice of the executive in all preceding states of siege, a practice not only submitted to by the legislature but expressly approved by formal act of the congress and by the various bills of indemnity by which they sanctioned all the acts performed by the president on those various occasions. But, as Milton remarks in this connection, when criticizing the practice and the congressional acquiescence in it, "the doubt which arises as the result of an abuse which has been practised does not destroy the true intent of the law," and in 1898 the federal supreme court distinctly established the constitutional doctrine that the inherent immunity of the legislative function can not be included among the guaranties which are suspended by the state of siege.[2] The same principle has

[1] Barbalho, *op. cit.*, p. 122.

[2] Accórdão No. 1,073, of April 16, 1898.

been reaffirmed in later decisions of the supreme court, especially with regard to the freedom of members of congress to publish their speeches before that body when and how they please, in spite of press censorship established under a state of siege.[1] This latter phase of the question of parliamentary immunities was the subject of widespread and heated discussion even under the state of siege declared in 1922.

The recognized constitutional doctrine to-day, therefore, is that although the language of the constitution refers to all constitutional guaranties, its meaning includes only the guaranties of those individual rights grouped under the generic term of "rights of man" and does not refer to the constitutional powers of each of the governmental branches. Nor does it refer to such rights as that of the public officer enjoying life tenure, though in an early decision the supreme court apparently held the opposite view.[2]

The mere declaration of the state of siege, apparently *ipso facto* and *propria vigore*, suspends all the individual guaranties, unless exceptions are specified in the decree ordering it. But, as a matter of fact, it is customary for the decrees, executive and legislative, to indicate not merely the geographical and temporal extent of the siege but also the particular guaranties which are suspended thereby. Most common, of course, is the suspension of the guaranties with regard to arrest; but liberty of motion is also usually circumscribed by the requirement of passports, etc. A favorite measure, and one that is the cause of much of the criticism directed against the employment of this emergency power, is the establishment of a press censorship. Justified though this measure may be in times of real crisis, especially in view of the virulent character of the press attacks, their dangerous effect on the populace, and the inadequacy of the criminal laws of libel and sedition, just so inexcusable and dangerous to individual liberty and popular control is it to employ this measure without justification, for publicity is a great check on administrative abuses, even in times of disturbance, and in the absence of free organs of criticism other abuses are fostered. Those who remember the protest called forth from all quarters by the muzzling of our own press during the late war will understand how obnoxious is such a measure in times of much less serious emergencies.

In view of all the doubts and conflicting opinions and practices that have existed in Brazil with regard to the employment of the emergency measure known as the "state of siege," it is curious that the congress has never exercised its legislative power to define by general law, passed in normal times, the manner in which this power should be employed. Several measures have indeed been introduced in the chamber of deputies with such an end in view, but they have for one

[1] See accórdão No. 3,536, of May 6, 1914. Cited in Araujo Castro, *op. cit.*, p. 346, n. 2.
[2] Milton, *op. cit.*, pp. 155, 156.

reason or another always failed of enactment, either in the chamber of deputies itself or, as happened in 1896, in the senate after having been passed by the chamber. There are, of course, obvious and inescapable difficulties in detailed and complete legislation to cover emergency situations, but so long as the executive has at his disposal this practically unlimited and oppressive weapon so long will the temptation exist to abuse it. It may be asked whether the restrictions that might be imposed by a general law would not prove of a moral and political advantage sufficient to offset the possible disadvantages resulting from tying the hands of the executive even in cases of real emergency.

In closing this brief examination of one of the most remarkable institutions of Brazilian government, it may be interesting to compare its nature with that of the suspension of the writ of *habeas corpus*, its supposed prototype in the constitution of the United States of America. The outstanding points of difference are that the former may be declared by the executive in the recess of congress, while the general opinion is that the writ of *habeas corpus* may only be suspended by the congress; the former suspends several of the individual guaranties, including, perhaps, even some of those of property, while the latter affects only the protection against wrongful imprisonment; and, above all, the former has been invoked more than a score of times in thirty-two years, while the latter was employed but once in a hundred and thirty-two years, though it must be remembered that our states enjoy the power of declaring martial law with much the same effect.

MARTIAL LAW AND THE STATE OF WAR.

The question naturally arises whether, in addition to the suspension of the individual guaranties expressly sanctioned under the state of siege in Brazil, there is also the institution of martial law as we know it in the United States, and if so, what are its effects, and in what relation does it stand to the state of siege on the one hand and the state of war on the other?

This raises some interesting and fundamental questions which have apparently not been answered in Brazil up to the present time. Nothing is said in the constitution of Brazil, any more than in our own federal constitution, about the declaration of martial law, and on its face the state of siege defined in the constitution of that country would seem to cover exactly the situations in which martial law can be declared in case of internal disturbance in the United States. But Brazilian jurists speak of martial law and distinguish it from the state of siege, on the ground that in the first case civil law is suspended and the civil courts are superseded by military tribunals, while in the state of siege civil law continues in vigor and military tribunals are expressly forbidden save for the trial of members of the armed forces

for military offenses (art. 72, sec. 23, and art. 77).[1] But it may be pointed out that these very provisions cited by the Brazilian commentator are enumerated in the section of the constitution which deals with the declaration of rights and which by the terms of the constitution itself are subject to suspension by the declaration of the state of siege. From this it would seem to follow that all of the consequences of martial law as we know it could flow from the declaration of the state of siege in the zone of actual military operations, but that independently of the declaration of the state of siege such a situation could not arise within the territory of Brazil itself.

In the statements made by Brazilian commentators with regard to the nature of martial law, there appears not to have been made clear the distinction between the case of a declared war with a foreign nation and an internal rebellion, which may have all the characteristics of a war without the name, a distinction with which our own courts experienced considerable difficulty at the time of our Civil War. The case of a declared war with a foreign country is relatively simple and will be considered presently in its bearings on the state of siege and the individual rights.

If the power of putting martial law into effect is, as Professor Willoughby points out,[2] but a form of the police power of the state, then it would seem that the states of the Brazilian Union would have that power equally with those of the American Union. But the Brazilian jurisprudence which denies to the states the right to declare a state of siege, with its suspension of individual guaranties, can not accord to them the power of declaring martial law, which in their view is the equivalent of military rule in time of war. Hence we see nothing in Brazil corresponding to the rather frequent instances of the proclamation of martial law by our state governors in times of strikes or other serious labor troubles. This undoubtedly accounts, in part, for the frequent use of the federal power of declaration of a state of siege used in connection with its power to intervene, upon request of the state governments, to reëstablish order and tranquillity in the states. The resources of the government being adequate, under the declaration of the state of siege, to cope with all cases of internal disturbance, the additional measure of martial law does not become a necessity. Whether the death penalty, which is abolished by section 21 of the declaration of rights, saving the provisions of military legislation in time of war, could ever be imposed on civilians in time of internal insurrection amounting to actual war has never been answered, nor, so far as noted, even been raised. It is accepted doctrine that the state of siege itself does not affect this portion of the declaration of rights, since article 80, section 2, expressly limits the executive to

[1] Milton, A., *op. cit*, pp. 156, 157.
[2] *The Constitutional Law of the United States*, Vol. II, pp. 1229 ff.

detention and deportation of persons, a limitation which is acknowledged to be equally binding on the other organs of the government, and which, moreover, is a necessity if the effects of the state of siege must, as the supreme court has declared they must, cease with the cessation of the state of siege itself. But if the doctrine of the United States as developed at the time of the Civil War were followed, that a state of war, with all its consequences, may arise from the case of rebellion, though it is not called war, then the imposition of the death penalty would seem to be admissible.

If the status of individual liberties under martial law in Brazil, and even the admissibility of martial law in time of peace, is in doubt, no less undefined, so far as constitutional provisions are concerned in the status of individual rights in time of war. Judging from our own experience in the recent war, it would seem safe to say that individual rights have no protection whatever from the constitution as against measures of national defense, even when those rights belong to a citizen, to say nothing of enemy aliens, though in truth the latter are sometimes accorded a protection, under well-established and generally accepted principles of international law, which the citizens do not enjoy, *e. g.,* immunity from military service. But in Brazil, where the constitution expressly protects resident foreigners on a parity with nationals, so much respect was paid to the constitutional guaranties when a state of war with Germany was recognized by congressional action as existing, that it was considered necessary to declare a state of siege in order to enable the government to take the necessary measures against enemy aliens and their property. Brazil, however, followed the example of the United States in depriving enemy aliens of the right to bring suit in the courts, contrary to the principles accepted on this point in the second Hague conference. The federal supreme court later enunciated the principle, quoted from the American *Corpus Juris,* that alien enemies have no rights and no privileges, unless by special favor, during time of war.

So far as the individual guaranties are concerned, therefore, it may be accepted in Brazil, as in the United States, that a state of war suspends sundry and all of them to the extent considered necessary by the legislative branch of the government.

CHAPTER VIII.

THE STATE CONSTITUTIONS.

THE PERIOD OF TRANSITION.

On November 15, 1889, the monarchy was overthrown by a bloodless revolution in Rio de Janeiro, the council of state abolished, the life tenure of the senate terminated, the chamber of deputies dissolved, and the supreme power assumed by a provisional government, with Marshal Deodoro da Fonseca as chief and seven ministers appointed by him. On the same day the provisional government promulgated its famous decree No. 1, which laid down the bases of the new *régime*. The text of this decree is of such fundamental importance as to warrant reproduction in full.

ART. 1. There is provisionally proclaimed and decreed, as the form of government of the Brazilian nation, the Federal Republic.

ART. 2. The provinces of Brazil, reunited by the ties of the federation, are constituted the United States of Brazil.

ART. 3. All of these states, in the exercise of their legitimate sovereignty, will at the proper time proclaim their definitive constitutions, electing their deliberative bodies and their local governments.

ART. 4. So long as there shall not have been elected by regular process the constituent congress of Brazil and likewise the legislatures of each of the states, the Brazilian nation shall be directed by the provisional government of the republic; and the new states by the governments they may have proclaimed, or, lacking these, by governors delegated by the provisional government.

ART. 5. The governments of the federated states will with all despatch take the measures necessary for the maintenance of order and public security, defense and guaranty of liberty, and the rights of citizens, whether nationals or strangers.

ART. 6. In whichever of the states, where public order is disturbed, and where the local government lacks adequate means for suppressing disorders and assuring public peace and tranquillity, the provisional government will undertake the necessary intervention with the aid of the public forces, to assure the free exercise of the rights of citizens and the free functioning of the constituted authorities.

ART. 7. The form of government proclaimed being the Federal Brazilian Republic, the provisional government does not and will not recognize any local government contrary to the republican form, awaiting, as behooves it, the definite pronouncement of the vote of the nation, freely expressed by popular suffrage.

ART. 8. The regular public forces, represented by the three branches of the army and by the national navy, of which garrisons or contingents exist in the various provinces, shall continue subordinate to and exclusively dependent upon the provisional government of the republic, the local governments being enabled by the means at their disposal, to proclaim the organization of a civic guard destined for the policing of the territory of each of the new states.

ART. 9. Likewise subordinated to the provisional government are all civil and military administrative authorities up to the present subordinate to the central government of the nation.

ART. 10. The territory of the neutral municipality shall be provisionally under the immediate administration of the provisional government of the republic, and the city of Rio de Janeiro is established, likewise provisionally, as the seat of the Federal Power.

ART. 11. The secretaries of state of the various departments or ministries of the actual provisional government are charged with the execution of this decree in regard to the portions thereof that fall to each.

At the time when these momentous developments occurred in the capital of the country, each of the twenty provinces of the empire was directed by a president appointed and removed by the emperor. Each province, moreover, possessed an elective assembly, which, by the *Acto Addicional* of 1834, had been accorded a considerable measure of local autonomy, only to be shorn of nearly all its significance by the later acts of interpretation and restrictive legislation. The effect of the proclamation of the federal republic was, therefore, to transform the provinces at one blow from administrative subdivisions without any real measure of local autonomy into what the first decree of the new government designated as states with a measure of "legitimate sovereignty."

When the news of the successful revolution of November 15 reached the capitals of the various provinces, which it did even in the most remote, Amazonas, by November 21, the succession of events was much the same. Notified through bulletins of the local republican newspaper, mass meetings were held, usually under the inspiration of the commanding officers of the local contingents of the army, jointly with the leaders of the municipal council and the chiefs of the republican propagandists, and a provisional government was chosen by acclamation to take over the power from the president. With but one or two exceptions the provincial presidents yielded up their power without the slightest resistance, and the supreme power in the state was conferred either on a provisional governor proclaimed by the soldiers and the people, or on a *junta* or provisional committee, or in one or two instances on officers designated by the provisional government at the capital. In all cases the officers of the army stationed in the capital of the province, or ordered there, assumed an important rôle in the constitution of the provisional authorities. The provincial assemblies as such took no salient part in the establishment of the new order of things, and were ordered dissolved, by decree No. 7 of the provisional government at Rio, on November 20 following. As regards the body of civil and military administrative officials, the proclamation of November 15 had decreed that they should remain in the exercise of their functions, so that the only immediate effect of the revolution was the substitution of the provincial presidents by provisional governors or *juntas*.

By decree No. 7, before mentioned, all governmental powers in the states were lodged in the hands of the governors, comprising wider attributes than were later accorded to the states under the federal constitution. But the provisional government expressly reserved to itself the right to restrict, amplify, or suppress any of these powers of the provisional governors, as well as the right to supersede the governors themselves if required for the public good or the peace and rights of the people. In the fifteen months of the provisional government of Marshal Deodoro that followed this decree, increasing use was made of this power to subject the provisional governments of the states to the controlling force of the central government, governors being removed and superseded by appointees of the provisional chief whenever they failed to yield implicit obedience, or even if only accused by their political opponents of failing to do so. In spite, therefore, of the liberal or even excessive principles of federalism announced at the outset of the new *régime,* the nascent states were subordinated as completely to central control as under the old *régime,* and a practice and tradition of national interference in local affairs grew up that was an unfortunate heritage for the system that was finally established and developed under the republic.

A fact of prime importance in the constitution of the state governments under the federal republic was that the fundamental bases for the new system were already laid down in the decrees of the provisional government before any steps were taken toward the drafting of constitutions in the states, although the state constitutions were all provisionally proclaimed prior to the final promulgation, by the constituent congress, of the federal constitution of February 24, 1891. On October 4, 1890, the provisional government decreed that the governors of the states should convoke the legislatures by April, 1891, to approve the constitutions of the states to be proclaimed immediately by the governors, subject to the approval of the legislatures.[1] But by that date there had already been in effect, since the 22d of June preceding, the draft constitution of the provisional government, determining not only the sphere of action of the states but also measures determining, in a degree, their organization, *e. g.,* suffrage qualifications, separation of powers, election of local officers and local judges, non-election of state judges, etc. It is true, of course, that the stipulations of the provisional constitution were subject to modification by the constituent congress, to be convoked on November 15 of that same year, and in certain particulars, as has been seen, they were so modified. But it was assumed, and did in fact occur, that the main features of the new system would follow the lines laid down by the draft of the provisional government.

[1] Decree No. 802.

Under the terms of this decree of October 4, 1890, the governors of the various states, beginning that same month, proclaimed provisional constitutions and issued calls for the election of the legislatures and the date of their assembling in order to ratify the constitutions so proclaimed. But, whereas the provisional constitutions of the states had been proclaimed before the national constituent congress had completed its labors, and in a number of instances before it had even assembled, the final promulgation of the constitutions by the legislatures of the states did not take place until after the federal constitution had been proclaimed and was already in operation.[1] But the central government was given no power, as had been done in the Argentine constitution of 1853, to revise these constitutions, so that provisions conflicting with the federal instrument were incorporated in a number of the state constitutions, some of which have not even yet been eliminated, as will appear later on.

The interval of time between the overthrow of the empire, on November 15, 1889, and the promulgation of the federal constitution, on February 24, 1891, was a period during which the former provinces showed an astonishing economic and material progress, but during which period political progress was not only not possible under the dominating control of the provisional government, a dictatorship in every sense of the word, but in which factional and personal animosities and bitternesses developed that were destined to disturb the development of normal political conditions in some of the states for many years to come. Rare were the states which in those few months did not have three, four, or even five successive governors appointed by Marshal Deodoro, to say nothing of the provisional juntas that served in many states during the initial period. Aside from the frequent changes of administration brought about by the central power, there began also during this period the practice of deposition of governors by violence, started in the state of Rio Grande do Sul and followed soon thereafter in Bahia and other states, inaugurating a system that has been the cause of much of the violence and the reason for much of the federal interference that have been practised in these states under the republican *régime*.[2]

The last state constitution to be promulgated by the newly elected legislatures was that of Matto Grosso, on August 15, 1891. Not three months later Marshal Deodoro accomplished his *coup d'état* and dissolved the national congress on November 3. The state governments acquiesced in this act, and for that reason, after Marshal Floriano Peixoto succeeded to the place of Deodoro on November 23, revolutionary disturbances broke out in all the states, with the sanction

[1] See Ch. I, pp. 11, 12.
[2] Freire, Felisbello, *Historia Constitucional da Republica*, Book II, Ch. XV.

of the central government, which deposed the governors, dissolved the legislatures and the courts, and annulled the existing constitutions. In consequence most of the states adopted new instruments in 1892, which in some cases have remained unchanged until to-day, but in others have been subsequently amended or completely superseded by other constitutions on various occasions.[1]

GENERAL FEATURES OF THE STATE CONSTITUTIONS.

The draft constitution of the provisional government had already, prior to the proclamation of the first state constitution under the terms of the decree of October 4, 1890, laid down not only the division of functions between states and federal government but also certain principles governing the organization of the former. These principles took the form both of specific requirements, such as the requirement that the state judiciary be non-elective and removable only by judicial sentence, that instruction be laic and unrestricted in all grades and free in the primary ones, and that the three powers of government be separate and independent, and also of general principles, such as that their form of organization be republican and conform to the constitutional principles of the Union. They also included the stipulations regarding the municipal system of the states in requiring that the municipalities should be autonomous as regards their own peculiar interests and should have a locally elected administrative authority, and admitting to the voting privilege and the right to hold office in municipal elections resident foreigners, under the conditions to be prescribed by each state.

The specific stipulations in these provisions were omitted or altered, as has already been seen, in the constitution as finally proclaimed, and the general terms were then, and to some extent still are now, not clearly defined. Some variations occurred, therefore, in the earliest state constitutions even as regards these general principles, while in matters not covered or not believed to be covered by these provisions considerable diversity appeared. Nevertheless, as was to be expected, the similarities are greater than the differences, and the chief features

[1] The state constitutions in force in the various states in 1922 are of the following dates, as compiled in Castro Nunes, *As Constituições Estaduaes do Brasil:* Alagoas, June 28, 1921; Amazonas, Oct. 20, 1913, amended in 1921 but the amendments contested in the supreme federal court; Bahia, July 2, 1891, with amendments on May 24, 1915; Ceará, Oct. 19, 1921; Espirito Santo, May 13, 1913; Goyaz, May 22, 1918; Maranhão, Feb. 24, 1919; Matto Grosso, Aug. 15, 1891, with amendments on Mar. 14, 1898; Minas Geraes, June 15, 1891, with amendments on Oct. 28, 1891, on Dec. 17, 1893, on Sept. 18, 1902, on Aug. 13, 1903, on July 27, 1905, on Aug. 14, 1909, on Sept. 1, 1913, on Aug. 1, 1916, and on Sept. 14, 1920; Pará, Oct. 23, 1915; Parahyba, July 30, 1892, amended slightly on Oct. 7, 1903; Paraná, Apr. 7, 1892, amended on Oct. 14, 1893, Mar. 10, 1913, Feb. 10, 1916, Feb. 11, 1916, and Feb. 14, 1917; Pernambuco, June 17, 1891, amended on Mar. 31, 1898, and Apr. 6, 1904; Piauhy, June 13, 1892; Rio de Janeiro, Nov. 15, 1920; Rio Grande do Norte, Mar. 25, 1915; Rio Grande do Sul, July 14, 1891; Santa Catharina, May 25, 1910; São Paulo, July 9, 1921; Sergipe, Sept. 20, 1913. In several of the states, *e. g.*, Espirito Santo, Pernambuco, and Sergipe, proposals for the amendment or revision of the constitutions are now under consideration.

of the state constitutions in Brazil can be outlined as readily as those of our American states.[1]

THE ELECTORATE IN THE STATES.

In another place we have already considered the extent of the federal provisions regarding the franchise and have shown that it is the accepted doctrine in Brazil that the terms of article 70 of the federal constitution not merely exclude certain classes of persons from being listed as voters for state elections, but that only Brazilian citizens more than twenty-one years of age and not mentioned in the exceptions there listed may be admitted to vote in state elections. In conformity with this principle most of the state constitutions merely reincorporate the provisions of article 70 of the federal constitution with regard to suffrage, the draft of the provisional government having prescribed the same terms. Nevertheless, in four state constitutions[2] foreigners are admitted to vote in municipal elections under certain conditions, an exception expressly included in the draft constitution of the provisional government but omitted in the final instrument, and justified on the ground that municipal elections are of an administrative and not of a political character and therefore not included in the provisions of the federal instrument.

Even the process of registration of voters was declared by federal law No. 1,269, of November 15, 1904, to be prescribed not only for national but also for state and municipal elections. The later law of August 2, 1916, however, referred only to federal elections. Nevertheless, the federal supreme court in 1920 stated that the states were bound to observe the federal law and to use only one voters' list. As a matter of fact, the states for the most part use the federal list for their own elections, though the diversity of the list for state and federal elections in some of the states has recently given rise to much discussion. Otherwise the accepted doctrine is that in the electoral process the state laws govern so far as state or local elections are concerned.

Direct voting is prescribed in all the states, with minority representation also a universal feature, but voting is in fact neither obligatory nor secret.

THE STATE LEGISLATURES.

The bicameral system, adopted by the provisional government for the national legislature even in its first convocation as a constituent convention, and universally encountered in the organization of the states of our Union, is found in only seven of the twenty states of the

[1] See, for such a comparative survey, as well as for the texts of the constitutions, the work of Castro Nunes, cited above, and the older study of Felisbello Freire, *As Constituições dos Estados e a Constituição Federal da Republica do Brazil* (Rio de Janeiro, 1898).

[2] Bahia, Goyaz, Matto Grosso, and Minas Geraes.

Brazilian federation.[1] The provincial assemblies in the empire consisted of but a single chamber, though it was proposed to make them bicameral on demand of the province itself. But when two provinces later requested this change, the national congress did not authorize it. It has been suggested that the bicameral principle for the organization of the legislature is one of the "constitutional principles of the Union," which by article 63 of the federal constitution must be respected by the states in framing their own constitutions, and as Araujo Castro points out[2] it would be just as logical to insist on that principle of governmental organization as on the principle of life tenure for the judges, as the federal supreme court has done. It may be remarked in this connection, however, that the draft constitution of the provisional government expressly stipulated the security of tenure of the state judiciary among the principles to be observed by the states, and did not mention the bicameral principle.

Though the bicameral principle is observed in less than a third of the Brazilian states, this number includes the first, second, third, and fifth in point of population, and the seven states that have it comprise two-thirds of the population of the country. Where the senate is found, it is usually half the size of the lower house, varying in actual numbers from 12 to 30, and the term of senators is twice as long as that of the deputies, though in three of the states it is nine years, or three times the normal three-year period of the lower house. The bicameral legislature is called *Congresso* in all the states but one (Bahia), where it is known as the general assembly, the upper house being in all cases called the senate and the lower house the chamber of deputies.

In the states having a unicameral legislature, called either legislative assembly or congress, the size varies from 18 to 48 members, and in the majority of the legislatures the term is three years.

Usually any elector is eligible for a seat in the legislative assembly, but the constitutions and the laws not infrequently establish cases of ineligibility and incompatibility. The parliamentary immunities of the legislators in the states are closely modeled after those of the members of the national congress, and the legislative procedure is also much the same. In all states the constitution authorizes the payment of a per diem and expense allowance, fixed by each legislature for the succeeding one.

The rôle of the legislature is much the same in all the states, all state powers which have not been prohibited by the federal or state constitutions, or expressly assigned to other organs of government, belonging, as in our states, to the legislature. Nevertheless, all the constitutions expressly enumerate the functions of the legislatures,

[1] Alagoas, Bahia, Goyaz, Minas Geraes, Pará, Pernambuco, and São Paulo.
[2] *Manual da Constituição Brasileira*, p. 170.

which include the passage, suspension, and repeal of laws, the imposition of taxes, the enactment of the budget, the veto of illegal municipal ordinances, the borrowing of money, the organization of municipalities, the determination of the public forces of the states, etc., in addition to the non-legislative functions of canvassing the results of the election of the state executive and participation in the impeachment process.

In discussing the division of functions between the nation and the states, attention was called to some of the mooted questions that still remain unsettled in that connection. Small wonder, therefore, that some of the state constitutions, dating, as they do, almost in their entirety from the year in which the federal constitution went into effect, or the year following, should contain provisions which are now regarded as clearly contrary to the federal instrument. Less understandable, however, is the fact that even those constitutions which have been amended or revised in the last decade or so should still retain provisions which are generally recognized as being in conflict with the federal constitution. Still more inexplicable is the fact that the state governments put into effect such manifestly invalid provisions of their constitutions, and that the jurisdiction of the federal supreme court is not more frequently invoked to render of no effect the governmental measures taken thereunder.

Among powers that are so accorded to the legislatures by state constitutions, expressly or by implication, in conflict with the provision of the federal document, may be mentioned the power to tax imports from another state under the guise of consumption or inspection taxes, the power to request federal intervention in cases other than that of article 6, section 3, of the federal constitution, the power to declare a state of siege and to grant amnesties, the power to prejudice substantive rights by reason of provisions of the codes of civil and criminal procedure, the power to determine the cases in which expropriation of private property may be practised, the power to legislate concerning authors' and inventors' rights, the power to legislate on questions of labor, etc. On many of these matters the supreme court of the Union has definitely spoken, and not a few state laws have been declared unenforceable by that court, although clearly sanctioned by the provisions of the state constitutions. In the presentation of this matter it must not be overlooked that various of our state constitutions in the United States contain provisions which are admittedly in conflict with the federal instrument, but it seems to be easier here to submit their validity to the supreme court of the Union.

The organization and powers of the legislature almost invariably precede, in the state constitutions, the provisions relating to the

executive, thus symbolizing the preponderant part which the legislature is supposed to play. But in the state of Rio Grande do Sul, which presents many peculiar features in its constitutional organization as well as in its actual politics, this order is reversed, and with good reason. For there the state president is not merely the executive and administrative head of the state, but he has the power of legislating on many important matters, such as the creation of offices, the expropriation of private property, the alienation of public property, the organization of the public forces, the determination of the boundaries of the municipalities, and many other functions that in the other states are entrusted to the legislative branch. Moreover, the limited functions of the assembly are there specifically enumerated, and all powers not so enumerated fall within the jurisdiction of the president, the only restriction on his freedom of action being the requirement that his legislative proposals must be submitted to the municipal councils for publicity, any citizen being permitted to offer amendments. The law as enacted by the president after the three-months period required for this examination stands unless objected to by a majority of the municipal councils, a curious sort of referendum provision, which, however, in the actual operation of the state's politics, is without real significance.

It is, of course, obvious that, with the whole domain of substantive civil, commercial, and criminal law withdrawn from the jurisdiction of the states by the federal constitution, the field of action of the state legislatures is greatly restricted as compared with that of the American state legislatures. The only strictly legislative activities left to them in Brazil include the civil and criminal codes of procedure in the state courts, and even these are restricted by some of the requirements of the federal constitution, such as that with regard to jury trial. Aside from that, the states have jurisdiction over matters that come within the field of administrative law, a concept that is not very extensive and the exact latitude of which is not yet a matter of universal agreement among Brazilian jurists. Under those conditions an annual legislative session of two or three months, as specified in the state constitutions (four months in São Paulo), would seem to be amply sufficient. But all the constitutions make provision for the extension of their regular sessions by resolution of the legislature itself (Rio Grande do Sul, alone, entrusting that power to the state executive) and for the calling of extra sessions by the executive, a practice which has been followed on more than one occasion.

In the amendment or revision of the state constitutions the legislatures play an important, though not exclusive, rôle. In a number of the Brazilian states the municipalities may propose constitutional amendments through their councils, and in one or two that is the

only way in which amendments may be proposed, though usually their power is concurrent with that of the legislature. Special formalities are required in the adoption of amendments or of new constitutions, such as special majorities, passage by successive legislatures, etc., but in no state is there any provision for a popular referendum. The executive ordinarily has no share in the process of constitutional amendment, save in Rio Grande do Sul, where he may initiate constitutional changes, subject to the approval of a majority of the municipal councils, the state legislature having no share in the process at all. Constitutional amendments and revisions have on the whole been rather frequent in the Brazilian states, though one or two of the states are operating under the first constitutions adopted in 1891 without any textual change. It must be pointed out, however, that by the text of some of the constitutions the concept of what is "constitutional," in the sense of requiring a formal amendment for its alteration, is restricted, as it was under the constitution of the empire, to the delimitation of powers between the various organs of government and the protection of civil and political rights. Even where no such express restriction exists, considerable latitude is exercised by the legislature in enacting laws that actually modify the constitution without observing the formalities required for constitutional amendments. In a few state constitutions (Pará, Espirito Santo, Alagoas, São Paulo) the device of a periodic revision of the constitution is found.

The legislatures of the states figure also as the legal representatives of those entities in virtue of various provisions of the federal constitution relating to state action, either by reason of express mention of that branch of the state government or under the general constitutional principle that the legislatures are the repositories of all powers not expressly confided to other organs of the state government. Under the first-mentioned class fall the cases of article 4 relating to fusion, subdivision, or annexation of the states with each other, and the proposal of amendments to the federal constitution by the states (art. 90). In the second class belong the cases of interstate agreements or conventions of a non-political character (art. 65), which by the terms of the state constitutions, however, are negotiated by the state executives and approved by the legislatures. These agreements are made subject to the approval of the national government by article 48, section 16, of the federal constitution, but many of them are not brought to the attention of the same. In this class falls also the case of federal aid granted in times of public calamity to "the state that may request it" (art. 5).

An important case of state and federal relations has already been considered in another connection, that of intervention by the federal

government in the internal affairs of the states. One of the contingencies under which that is permitted by the federal constitution is the case of reëstablishing order and tranquillity in the states "upon requisition of the respective governments." The term "government," though commonly used to denote the executive branch of government, is interpreted in this connection to mean any of the three branches indiscriminately; so there is nothing to prevent the state constitutions prescribing, as a number of them do, that the legislature as well as the governor may invoke federal intervention. Indeed, it is a question whether under the accepted interpretation of this section of the article on federal intervention the state constitutions could effectively withdraw from the legislatures the power of invoking federal intervention in those cases.

THE STATE EXECUTIVES.

It is in the organization and powers of the executive that the state constitutions in Brazil, to say nothing of the laws and the political practice, depart most radically from the North American model. The state executives in that country are modeled on the federal executive, who, as has been seen, is in various respects relatively more powerful in the Brazilian federation than in the United States of America, the classic land of "presidential government." In other words, whereas the executive branch of our state governments is distributed among a large number of more or less independent powers, the executive power in the states of the Brazilian Union is concentrated in the hands of a single chief, on whom all the other executive and administrative authorities are dependent and to whom they are subordinate. If the most far-reaching of the schemes now on foot in the United States for the reorganization of state administration were put through without modification, the American state governor would still be markedly inferior in power and prestige to the Brazilian state executive.

The state executive is called "president," after the manner of the earlier provincial executives, in a majority of the states (11 of the 20) and "governor" in the other 9. The designation "governor" was employed in relation to the state executives in one of the earliest decrees of the provisional government of Brazil (November 20, 1889), but apparently did not strike root generally in the states, where the term president was already familiar.

Direct election for state executives is the universal rule in Brazilian states, nearly all of them requiring an absolute majority of the popular vote, failing which the state legislatures choose as between the two highest candidates. It may be said, in passing, that the cases in which the votes are so scattered among several candidates as to

prevent anyone from having an absolute majority are as unknown in state as in national elections, a situation that may explain the curious omission in four of the state constitutions of all mention of the procedure to be followed in case no candidate receives such a majority. Only in one state is there provision for a second election in such a case.

The eligibility requirements for the office of chief executive are generally the same as those for members of the state legislature, though a higher age requirement is common and naturalized foreigners are quite commonly excluded. But what is more peculiar is that in four state constitutions[1] only a person born in the state is eligible to the office of state executive, the result, probably, of unthinking imitation of a provision of the federal constitution rather than of an excess of local pride. The constitutions and laws establish numerous cases of ineligibility and incompatibility, chief among which figures the ineligibility for reëlection, a provision that is not without historical and present interest.

The ineligibility for reëlection of the chief executive and his immediate relatives in the succeeding term was incorporated, practically without dissent, in the federal constitution. Following this example, all but two of the state constitutions[2] incorporated similar prohibitions. In two other states reëlection was permitted for a time,[3] but was abolished by amendments adopted in 1921, and authoritative opinion is practically unanimous as to the necessity of this prohibition, given the enormous prestige of the executive and the means at his disposal for assuring his own reëlection. In fact, some commentators have gone to the extent of insisting that the ineligibility of the executive for immediate reëlection is one of the "constitutional principles of the Union" that must be respected by the states in the organization of their governments, though this extreme view of the scope of article 63 is almost universally rejected. Of the two states where reëlection is permitted, a two-thirds majority of the popular vote is required in Pará and a three-fourths vote in Rio Grande do Sul, which has not prevented two or three men from exercising the executive power almost continuously since 1891 in the former state, and one man, Borges de Medeiros, from being president, with one interruption, in the latter state since 1898 and reëlected for another term of five years beginning in January 1923.

The four-year term of office for the executive is all but universal, Rio Grande do Sul again, the state of executive government *par excellence,* establishing five years. As a result of the almost universal three-year term for the legislature and the four-year term for the executive, it is true in the states, as in the national government, that

[1] Maranhão, Pará, Parahyba, and Rio Grande do Sul.
[2] Pará and Rio Grande do Sul. [3] Alagoas and Ceará.

only once in 12 years do the voters have an opportunity of determining simultaneously the character of the executive and the legislative branches of the government, and even then in the states with a bicameral legislature only the lower house is totally renewed.

Both in the election and the removal of the executive the constitutions give the legislative branch an important rôle. The provisions of the federal constitution whereby the legislature acts as the canvassing body for the elections of the executive are reproduced in the state constitutions. The same possibility arises, therefore, in the latter case as in the former, viz., that the results of the popular election might be vitiated by political excesses of the legislature. That this has not more frequently occurred is easily explainable by the simple fact that the same political forces which control the "official" candidacy for the post of executive control also the make-up of the legislature, so that when there is a political upheaval by the "outs," commonly known as the *"opposicionistas,"* against the "ins," generally designated by the significant name of *"situacionistas"* (literally those situated or seated), the case of a duality of legislatures not infrequently arises, as occurred in 1922 in the state of Rio de Janeiro, each of which claims the right to *"apurar"* (literally, "purify") the election of the executive. In such cases federal intervention usually follows.

Many of the same considerations apply to the practical significance of the power accorded to the legislature by the constitutions of a number of the states to terminate the mandate of the executive, by reason of mental or physical incapacity, and the power of impeaching him for malfeasance in office. The impeachment proper is almost universally lodged with the legislative body, the trial being entrusted commonly to the senate in the states where there is one, or to the assembly itself, or to the state supreme court, or to a special tribunal composed of legislators and judges. Instances of attempted removal from office of the state executive have occurred, but in an actual contest the latter is possessed of the more effective power, and a situation of conflict is almost sure to arise of such a nature as to prompt federal intervention. Indeed, where the state executive is in opposition to the national administration, the best hope of success for the local opposition is generally to create a situation in which the federal government is led to intervene. On more than one occasion that has been the line of action followed by the opposition, but it must be admitted that on the whole the federal government seems to have been disinclined to intervene even when circumstances seemed to require it, rather than proving too ready to take advantage of local conflicts to strengthen the position of its own supporters.

The dominant position of the state executive as head of the administration has already been mentioned. Appointments, promotions, disciplinary measures, and removals are his to determine, limited more or less extensively in various states by legal provisions governing these matters. But in fact, even more than in law, the patronage power, direct and indirect, of the state executive is very extensive and constitutes one of the most effective of his political weapons. But even in the legislative field proper, the state executive, in the image of the national executive, enjoys a very extensive power. This flows from what is commonly designated by Brazilian jurists as the *"poder regulamentar,"* or ordinance power. But it includes not only the power of supplementary legislation, that is, of decrees and regulations in execution of specific legislative enactments, itself a much more extensive power than is left by our legislative practice to the executive, but also an inherent power of regulation or legislation on matters not covered by acts of the legislature, so long as it does not run counter to existing legislative provisions.[1] This is all in addition to the legislative powers involved in the sending of messages to the legislature, in the submission of specific bills for enactment, and in the veto power. The latter is as a rule closely modeled on the provisions of the federal constitution, though some interesting variations occur. In accordance with the accepted doctrine in the federal sphere, the power of vetoing only parts of a legislative enactment is not recognized in the absence of a constitutional provision permitting it. Nevertheless, five state constitutions expressly prohibit partial vetoes, while an equal number expressly permit the partial veto in regard to the budget or other measures enacted from year to year, or (Minas Geraes) in regard to any other measures parts of which are capable of being vetoed without affecting the purport of the remainder.

Other important powers of the state executive include the pardoning power and the direction of the public forces of the state. The executive is, as a rule, given the power to grant pardons for ordinary crimes not falling within the jurisdiction of the federal courts, the legislatures having the power of pardon with regard to official crimes, though in a few states the executive has the pardoning power in both classes of cases. Inasmuch as the criminal code is a federal law, it has been argued that the state executive could not constitutionally be given the pardoning power. But, as has been seen, though the federal law defines and makes punishable all ordinary crimes, these are tried by the state courts, with certain specified exceptions, and there is no inconsistency in granting the power of pardon, which is in essence merely an extension of the power to try and sentence, in

[1] The unique position of the state executive in Rio Grande do Sul with regard to legislation has already been noted.

those cases to the state executive. More involved is the constitutional question as to the powers of the executive as head of the police force of the state. These police forces are in many states organized along strictly military lines, a situation which the federal law of January 3, 1917, expressly recognized in incorporating these "militarized police" into the national army as auxiliary forces. But some state constitutions go so far as to authorize the executive to levy military forces in cases of invasion or internal disturbance, going even to the extent of calling citizens to arms and incorporating them into the organized forces of the state. This is manifestly in conflict with the provisions of the federal constitution, which established the federal power of intervention and declaration of a state of siege for just such cases. Nevertheless, at present writing (June 1923) the president of the state of Rio Grande do Sul, in which a revolutionary movement has been active since the beginning of the year, is exercising the power conferred upon him by the constitution of the state to organize and direct the public forces of the state, resorting to compulsory service, as sanctioned by article 20, section 10, of the state constitution.

Considering the powers commonly accorded to the state executives, constitutional, extra-constitutional, and even unconstitutional with relation to the federal government, it is not surprising that the state executive is the political boss in his domain, and that even though he and his immediate relatives may be constitutionally forbidden to succeed to the office, a prohibition which may be circumvented by his resignation from office six months, or whatever the specified period may be, before the new election, he is in a position virtually to dictate who his successor shall be. Under such a situation there is little hope of successful opposition by ordinary political means, and violent measures become the only recourse of self-sacrificing and patriotic citizens, as well as of less worthy seekers after the flesh-pots. In this condition is to be found the explanation of the many cases of the disturbance of public order which have cropped up again and again in various parts of the republic, inviting, when not indeed necessitating, federal intervention to restore order. That in cases of such intervention the forces hostile to the administration in power in the nation should receive slight consideration is almost inevitable, politicians in Brazil, as elsewhere, being nothing if not human.

One other fact in connection with the state executives is worth noting. Though the first constitutions of the states followed the federal model in providing for an elective vice-president or vice-governor to succeed in case of death or disability of the executive, recent constitutional amendments have abolished this office in four of the states, passing the succession to the president of the legislature and then to the president of the supreme court. This is in line with the

tendency that is receiving increasing support in Brazil and has been accorded recognition in recent constitutional reforms in other states of Latin America as well. In the state constitutions, as in the federal constitution, a new election is almost universally required if the vacancy occurs during the first half of the executive term, or during the first three years, as was stipulated in the draft constitution of the provisional government.

THE STATE JUDICIARY.

If the state executive in Brazil stands in a position strikingly different from that of his North American confrère, no less marked is the position of the state judiciary so far as manner of selection and term of office are concerned. In no case is popular election resorted to as the means of picking the members of the state judiciary proper, that is, the law judges (*juizes de direito*), corresponding to our district judges, and the members of the highest court (*desembargadores*). There is nothing in the federal constitution to forbid this method of selecting the state judiciary from the highest to the lowest, but the overwhelming sentiment of Brazilian jurists is against this method of selection, and they point to the United States as a horrible example in this respect, quoting with approval Bryce's observation that such a system of selection tends to secure judges of an inferior character whose courage and independence are likely to be impaired. Nevertheless, in a few states (Pernambuco, Espirito Santo, and Paraná) the municipal or district judges, corresponding in a measure to our county judges but not included in the concept of the "magistracy" or judiciary (*magistratura*), are chosen by popular election, as are also generally the justices of the peace with administrative functions.

The second outstanding characteristic of the Brazilian state judiciary is their life tenure (*vitaliciedade*). This characteristic is consecrated not only by the provisions of the state constitutions themselves, but has been affirmed by the federal supreme court, as has already been noted, to constitute one of the "constitutional principles of the Union," which the states are bound to observe in the drafting of their own fundamental laws. Here again this attribute is accorded by the constitutions only to the district judges (*juizes de direito*) and to the judges of the highest court (*desembargadores*), and the federal supreme court has sanctioned this limitation of the general principle of life tenure for judges.[1]

The judicial hierarchy is much the same in all the states, though the terms used differ from state to state. At the top is an appellate court, known generally as the superior court of justice or the court of appeal (*Tribunal da Relação*). This court consists of a varying

[1] Accórdão No. 5,524, of December 24, 1919. Quoted in Castro Nunes, *As Constituições Estaduaes*, p. 145.

number of judges, from 5 to 12, appointed by the executive. His freedom of choice is limited in various ways in the different constitutions, practically all of them requiring that he select one of the district judges for the post. Moreover, he is limited in a half dozen of the states to selecting the district judge of longest standing, though in most of the states he can select on the basis of merit also, not infrequently from an eligible list prepared by the superior court itself. It is clear, therefore, that there is little opportunity for the state executive, powerful as he is in other matters of personnel, to stack the supreme court of the state, especially as in a court of life members any given executive will rarely have the opportunity to appoint more than one new member.

While the state constitutions go into considerable detail regarding the highest court, they generally leave the organization of the lower courts to the legislature. But they refer indirectly to the law judges and determine their selection by appointment and their security of tenure. Below these are the municipal or district judges, with a limited jurisdiction, also commonly appointed, and the justices of the peace, usually chosen by popular election but having an administrative rather than a judicial character. In every state there is a jury for the trial of criminal cases, required, as has been seen, by the federal constitution, but the extent of whose jurisdiction and the manner of whose functioning are not definitely fixed, and therefore vary from state to state. But the federal supreme court has held that the states may not so emasculate or alter the characteristics of the trial by jury as to substantially destroy the fundamental safeguards of the institution, such as the secret ballot and the right of peremptory challenges.

The permanency of tenure of the judges, guaranteed by the state and federal constitutions, does not, of course, mean the impossibility of their removal for adequate cause. It does mean that they shall not be removed except by reason of criminal sentence or of mental or physical incapacity. The supreme court itself ordinarily judges its members as regards the latter and for ordinary crimes, while the legislature, or the senate where there is one, tries its members for official crimes, though in some cases a special tribunal is provided. The law judges are tried by the superior court, and the lower judges, appointed or elected for a definite period, are tried by the law judges.

In all the constitutions mention is made of the department of the attorney-general, or public prosecutor, under the title of *ministerio publico*. At the head of this branch of the public service, unparalleled in our judicial organization, though approximated by the attorney-general's department, stands the *procurador geral*. In a half dozen state constitutions this officer must be chosen, like his counterpart in the national government, from among the members of the superior court, of which he remains for many purposes a part, with the ad-

vantages and disadvantages already considered in discussing the federal office. Other states, however, permit him to be selected outside of the membership of this court, or even of the state judiciary.

It may not be out of place to repeat here that the Brazilian jurists themselves have not been sparing of criticism of the administration of justice by the state judiciary, especially in the lower instances. But a good part of this criticism is perhaps more properly directed against the laws under which they operate and which they have to apply, especially the procedure which is unnecessarily long drawn out and expensive, than against the character of the men appointed to judicial office.

LOCAL GOVERNMENT.

In considering, in an earlier chapter, the constitutional position of the states, we had occasion to refer to the peculiar provision of article 68 of the federal constitution, which stipulates that in the organization of their own governments the states must assure the autonomy of the municipalities in everything respecting their peculiar interests. This is, of course, an important departure from our own federal instrument, which neither directly nor indirectly assures to the governmental subdivisions of the states any measure of local autonomy, though it does afford them some protection as regards their property and insures the security of their legally valid obligations. On the other hand, the brief statement contained in the aforementioned article 68 was less explicit than the provisions of the draft constitution of the provisional government in this regard, which specified the elective character of the local administration and even admitted resident foreigners to the vote and to the right to hold municipal offices. One amendment offered in the constituent congress even went so far as to assure to the municipalities the right of framing their own charters. But the constituent congress finally couched the provision in its present simple form, not because of antagonism to the broadest form of municipal autonomy, but because it was felt that in entering into details as to municipal organization within the states the federal constitution would be infringing, to an unjustifiable extent, upon the proper autonomy of the states themselves.

In execution of the stipulation contained in the federal constitution, each state constitution contains a special title or chapter dealing with the municipality. These portions of the various constitutions are alike in that they all assure to the municipalities autonomy in what relates to matters of their own peculiar interest. But they differ in the amount of detail into which they enter in the elaboration of this precept, some contenting themselves with a few lines, others elaborating virtually a municipal code. All of them, however, have

in view a municipal law to supplement the provisions of the constitution relating to this subject.[1]

The general principles of municipal organization in the various states are very similar, though varying in certain important particulars. So the basis of municipal organization in all but two of the states is that of the general charter system, "home-rule charters," as we know them in the United States, being unknown, merely the power to constitute and regulate their own services being established in two or three states of Brazil (Santa Catherina, Rio Grande do Sul, and Goyaz). But even in those states the constitutions and supplementary laws contain rather detailed provisions as to the machinery of local government, the manner of election, the term of office, and the titles and functions of the organs of municipal administration all being fixed for them.

It may be well to point out at the very beginning the difference between the legal and practical concepts of the *municipio* as that term is used in Brazil and the Latin-American countries generally and the term "municipality" as used in our jurisprudence. As far as physical and geographical features are concerned, the Brazilian *municipio* corresponds to our counties, not to our municipalities. The entire territory of each state is divided in Brazil into these *municipios,* the constitution usually prescribing a minimum population for each. They are, therefore, large areas,[2] including chiefly rural territory, in addition to the city which is the seat of government and other urban centers which may be cities, *villas* or towns, or merely villages (*povoação*). These latter may be districts of the *municipio,* with special organs of local administration, but they are not the districts to which the federal or the state constitutions refer in speaking of municipalities and their autonomy, but form part of the same. In the United States generally it is the urban areas that are known as municipal corporations, with the special powers and attributes flowing from that character, while the larger areas, the counties, are quasi-corporations. In Brazil the situation is just the reverse. From this point of view the Brazilian *municipio* is more like the French commune, which ordinarily comprises more rural than urban territory, and not like the American municipality, which by the general rule is by definition limited to urban and suburban territory.

Among the characteristics of Brazilian municipalities which are universal and may indeed be considered as involved in the concept of autonomy as established by the federal constitution, is the elective character of the local council. That feature is indeed consecrated in

[1] These municipal codes are collected in Nunes, Castro, *Do Estado Federado e Sua Organização Municipal* (Rio de Janeiro, 1920).

[2] Amazonas, the largest state in the Brazilian Union, has 28 *municipios,* with an average area of 25,000 square miles each. Rio de Janeiro, the most densely populated state of the Union, has 48 *municipios,* with an average area of 562 square miles.

all the state constitutions and laws, but it has been largely emasculated by the fact that the local councils are not given the power to judge of the elections and qualifications of their members. The various states have entrusted the decision of election controversies to the state courts, to the state legislatures, and even to the state governors. These provisions have been attacked, in *habeas corpus* proceedings before the federal supreme court, as violating the guaranty of municipal autonomy contained in article 68. But in spite of the notorious fact that this power of passing on the validity of municipal elections has in practice been employed to defeat the will of the local electorate, and in spite of the forceful opinions of members of the supreme court itself, this tribunal has not considered the state constitutional and legislative provisions in question as violating the requirements of the municipal autonomy consecrated by the federal constitution, at least so far as legislative or judicial review of local elections is concerned. It has, however, opposed its authority consistently against the annulment of local elections by the state executive.[1]

But while the elective character of the municipal councils has been universally recognized as being required by the constitutional guaranty of municipal autonomy, the same has not been true of the elective character of the chief administrative officer. It will be remembered that the draft constitution of the provisional government expressly included the elective character of the local administration among its requirements of municipal autonomy, but the constituent congress eliminated that along with the other detailed provisions, from which it might naturally be concluded that the latter did not regard this feature as a necessary characteristic of local autonomy. But Ruy Barbosa and numerous other leading exponents of the Brazilian constitution have steadily maintained that to make the administrative head of the municipality an agent of the state executive, appointed and removed by him instead of locally elected, as has been done in a number of the states, is to strike at the very root of local autonomy, and of the soundness of that view there can hardly be any doubt. In eight of the state constitutions the prefect of the capital itself is made the appointee of the state executive, and for that there is something to be said as an admissible exception to the principle of local autonomy. But as regards the administrative heads of the other municipalities, it is a curious fact that until 1920 the federal supreme court was of the opinion that the appointment of the local administrative head, prefect, *intendente,* or superintendent, as he is variously called, did not violate the principle of local autonomy. In a decision of May 26, 1920, however, the supreme court reversed its position on that point and declared unconstitutional

[1] See accórdão of January 3, 1920. Cited in Nunes, Castro, *As Constituições Estaduaes*, p. 162.

the provisions of the municipal law of the state of Rio de Janeiro putting the local executive functions in the hands of a centrally appointed prefect in all municipalities in which public services are carried on under the financial responsibility of the state, or where the muncipalities had entered into contracts guaranteed by the state. Under this decision the provisions of the municipal law in Bahia and Parahyba, providing for the central appointment of the municipal executives, would appear to be equally invalid, though the case of the eight or nine states that provide for the central appointment of the executive head of the state capital is not touched in that decision.

Though the constitutional and legal provisions of the states accord a substantial measure of autonomy to the municipalities as regards the scope of the matters under their direction, there are two important limitations to note. One is the limited character of the financial resources of the municipality and its strict subjection to the supervision of the state authorities, and the other is the power accorded to the state authorities, in some cases the legislature, in others the governor or president, to suspend or annul the resolutions or acts of the municipal authorities. This is generally limited to the case when such resolutions or acts are contrary to the constitution or laws, or violative of the rights of other municipalities. But this qualification has in general been given a liberal interpretation, and in some states it has been expressly extended to cover acts or resolutions deemed to be contrary to the "interests" of the municipality itself (Pernambuco), which, of course, at once removes all power of independent action by the municipalities whenever their action does not suit the central authorities.

Without being able, in a brief survey such as this, to discuss in detail the texts and actual operation of the constitutional and legal provisions of the states in their bearing on the guaranty of municipal autonomy, some color would seem to be given to the view of Amaro Cavalcanti,[1] expressed, it is true, more than twenty years ago, but quoted with approval by other Brazilian students as applicable to conditions to-day:

> Nevertheless, in practice, it may be affirmed that municipal autonomy does not really exist, though it is not denied that it is solemnly consecrated in the texts of the state constitutions.
>
> In fact, of what avail is the dead letter of the constitution against the action or the caprice of the governments? None; that is the eloquent answer of the facts.

One curious provision of the federal constitution remains to be mentioned in this connection, the only one that expressly mentions municipal functions. That is found in section 5 of article 72, which enumerates the individual rights and stipulates that cemeteries shall be secular in character and shall be "administered by the municipal

[1] Cavalcanti, *Regimen Federativo*, p. 368.

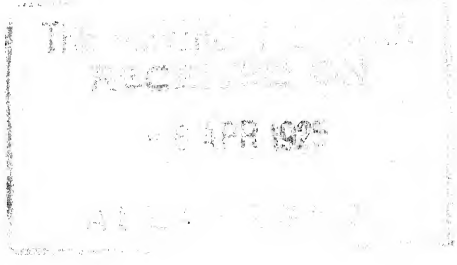
authority." Obviously, the purpose of this provision was not directly or even indirectly to secure the municipalities in their rights over cemeteries as against the state authorities, yet that seems to be the inescapable result of the language employed. So far as could be discovered, however, the constitutional question of municipal autonomy involved has never been raised.

STATE BILLS OF RIGHTS.

An interesting point of comparison between the Brazilian federal system and our own develops from an examination of the declarations of individual rights. In the United States of America, the state constitutions, even before 1787, usually included a declaration of the rights of man in some form or other, and when the federal constitution came to be framed such an enumeration was left out of that instrument as being unnecessary. In Brazil, on the other hand, the federal constitution, which preceded the state constitutions in their final form, contained a very extensive enumeration of civil rights which bound the state governments equally with the national government, and hence such an enumeration became superfluous in the constitutions of the states, unless, indeed, they wanted to extend the scope of the protection against state governmental action beyond that already laid down by the federal instrument.

In fact, a number of the state constitutions restricted themselves to a declaration that the state assures within its limits the effectiveness of the rights and guaranties established by the federal constitution, and even that reference was quite unnecessary, once granted that the federal bill of rights constituted a limitation on the state governments, a point that may perhaps not have been beyond the possibility of a doubt at that early date, owing to the fact that this extension to the states was expressed under the somewhat indefinite reference of "constitutional principles of the Union."

Nevertheless, just as the constitution of the United States was later amended by the adoption of the first ten amendments, so in Brazil some of the state constitutions (Espirito Santo and Minas Geraes) repeat the detailed enumeration of the federal declaration of rights, an enumeration retained in the constitutional revisions that have been made long after the applicability of the federal constitution to the state governments was an established and accepted doctrine.



CHAPTER IX.

THE FEDERAL DISTRICT AND THE FEDERAL TERRITORY OF ACRE.

THE FEDERAL DISTRICT.

In the chapter dealing with the federal basis of the Brazilian system, attention was called to the wholly different position occupied by the federal district in Brazil from that assigned to the District of Columbia in the American scheme of things. It seems worth while to sketch briefly at this point the main features of the governmental organization and powers of this federal district of more than 1,000,000 people,[1] and an area of 436 square miles, destined to become an autonomous state of the Union on a basis of complete parity with all the others when the constitutional provision looking to the transfer of the national capital into the interior is given effect.

The constitution, as has been noted, refers specifically to the governmental organization of the federal district in several separate divisions, and indirectly, according to the prevailing theory, if not recognized in the actual practice, in the article of the constitution that refers to municipal autonomy. Article 34, section 30, enumerates among the exclusive powers of the national congress that of "legislating upon the municipal organization of the federal district, as well as upon police, higher education, and the other services in the capital that may be reserved to the government of the Union." Section 4 of article 35 mentions among the non-exclusive powers of the congress that of providing secondary instruction in the federal district. Finally, article 67 prescribes that "saving the restrictions specified in the constitution and the federal laws, the federal district is administered by the municipal authorities; the expenses of a local character in the capital of the republic fall exclusively upon the municipal authority." There are other references to the federal district in the constitution, such as the one already mentioned dealing with the future establishment of the district as a state, the representation of the federal district in the national congress, the election of president and vice-president, the obligation to extradite criminals, and the obligation of the federal district to furnish proportionate contingents for the army. But these provisions relate rather to its position in the federal structure than to its internal organization and powers.

The first law relating to the government of the federal district under the existing constitution was enacted on September 20, 1892. Up to that time the district had been governed under decree No. 50 A of the provisional government, of December 7, 1889, which dissolved the

[1] 1,157,873 on September 1, 1920, of which about 800,000 lived in the city proper.

existing municipal council and substituted a governing board of seven members under the immediate direction of the provisional government itself. On November 14, 1890, the same authority promulgated the first law governing the judicial organization of the federal district. Various decrees modified the original measures of the provisional government regarding the federal district, but the law of September 20, 1892, laid the basis for the present organization, though legislative acts and executive decrees continually amended the provisions of the earliest law. In 1902 (law No. 939, of December 29) the municipal government was reorganized, and in 1904 a consolidation of the laws relating to the federal district was issued (decree No. 5,160, of March 8), which now forms the judicial basis of the municipal organization. Even this has been altered by later laws and decrees, which have modified it in important particulars.[1]

The legislative functions of the federal district are exercised by a deliberative council of twenty-four *intendentes,* chosen by popular election for a term of three years, all of the councilmen going out of office together. The qualifications for voting in the municipal elections of the federal district are the same as those prescribed for the national elections, and the process of inscription in the voters' list is the same. The federal district is divided into two election districts with 6 precincts each, each district choosing twelve councilmen.

The election occurs on the last Sunday in October of the year in which the three-year term ends, on November 15.[2] The organization of the election-boards in each precinct is similar to that prescribed in the election law for the choice of national deputies and senators, each board consisting of five voters. The voting begins at 10 o'clock, each candidate being entitled to representation by a watcher or inspector, the same being true for every group of ten or more voters that may desire it. The voters are called by name in alphabetical order and identified by their election-cards, sign the election-roll, and deposit in the ballot-box a list of eight names. The ballot may be written or printed on ordinary paper without any distinguishing mark and must be closed on all sides.

The canvass of the votes is performed ten days after the election, by the prætors, or municipal judges of first instance, sitting as a body, who examine the formal election acts turned in by each precinct board and send a copy of the final result to the secretary of the council, the original being sent to the administrative judge of the municipality. The names of the candidates for each of the two districts are pub-

[1] The legal provisions governing the administration of the federal district effective in 1914 were officially compiled in that year by Alexandre Soares de Mello, under the title of *Compilação das Leis Federaes sobre a Organisação Municipal do Districto Federal.* This compilation was used as the basis for the sketch herein given, with reference to some of the later measures introducing still further modifications.

[2] An election for councilmen was held in 1922.

lished in the descending numerical order of votes obtained, the twelve highest in each district being declared elected. The chairman of the canvassing-board notifies each successful candidate of the result of the election.

The new council itself passes on the qualifications and elections of its members, and orders new elections when, in consequence of the annulment of an election in any precinct, a candidate who has been declared elected retains a number of valid votes inferior to that of any candidate not included in the list. In case of vacancy for any cause, the president of the council must call a new election within sixty days, or in case of his failure to do so the minister of the interior of the national government will designate the election day.

The qualifications for election to the municipal council are in general those of the electors, but the law establishes a number of cases of ineligibility, chief among which are a six-months' residence requirement and the exclusion of persons who have occupied higher military, judicial, or administrative posts within six months before the date of the election, persons who are involved in judicial proceedings with the municipality or who are interested in contracts with the same, and relatives to the second degree by blood or marriage of the prefect.

The councilmen receive a per diem during the regular or special sessions of the council. The law specifies two regular sessions each year, of two months each, beginning in April and September, respectively, and incapable of extension. But special sessions may be called by the prefect or by the president of the council, in which, however, only those matters mentioned in the call may be considered.

The council meets in public session and perfects its own organization, electing from among its members its president and secretaries, who constitute the executive board (*mesa*). For ordinary business a majority of the members present is sufficient, but taxes and appropriations require the approval of an absolute majority of the members of the council and must be submitted to three readings.

The powers of the council include the following functions:

To pass on the election of its members;

To adopt its rules of procedure;

To organize its secretariat and appoint the employees of the same;

To regulate the conditions of appointment, suspension, retirement, and other conditions of the employees in all municipal services;

To adopt the annual budget, subject to the powers of the prefect with respect to the initiative in increases or diminutions in salaries, in the creation or abolition of positions, and in loans and other credit operations;

To vote any and all taxes which do not belong exclusively to the federal government;

To contract loans, determining the conditions of their issue, the time, manner, and method of payment, foreign loans being permitted only with the approval of the national congress. No loans shall extend over a period of more than fifty

years, and the sum total of indebtedness shall not exceed the amount on which interest and sinking fund can be paid out of the annual realty tax;

To control the administration, leasing, income, and rental of municipal property; sell or exchange the same, saving the property entrusted to the prefect, under fixed conditions of sale by public auction;

To employ the power of eminent domain, saving the powers conferred in this regard upon the prefect;

To decide upon the purchase of realty when required for public use;

To enact a code of municipal ordinances, the penalties for the infraction of which are governed by national laws in the matter of procedure;

To impose fines up to 1:000$ (at normal exchange rates the equivalent of about $250) and imprisonment up to fifteen days, as well as other penalties such as cancellation of licenses, closing or demolition of premises, etc.;

To create municipal depositories for the storing of objects taken in execution of the ordinances;

To legislate on railways or other systems of transportation within the federal district;

To confer powers upon the prefect when expedient;

To regulate the preservation and conservation of municipal property;

To establish and regulate the service of public medical assistance, individuals being free to create and maintain philanthropic institutions, subject to official inspection only as regards morality, sanitation, and records;

To establish and regulate primary, industrial, and æsthetic education; to establish, support, or subsidize all institutions of instruction which the municipality may require, such instruction to be laic in all grades. Individuals are free to open and conduct schools of any grade or nature, subject to official inspection only as regards morality, sanitation, and records;

To create municipal libraries and regulate their services;

To control the service of municipal sanitation;

To create and regulate all services relating to bath-houses and wash-houses, fairs, markets, theaters, public exhibitions, fire protection, and factories;

To provide for the establishment and administration of cemeteries and interment, monopolistic privileges being, however, forbidden;

To control the water-supply, supervising fountains, springs, watering-places, aqueducts, etc.;

To control the conservation and replanting of woods and forests and the care of parks, gardens, public places, and monuments;

To control the navigation of rivers and lakes, hunting and fishing, and the embarkation or disembarkation of persons, baggage, and goods on the shores and banks within the municipality;

To regulate the service of telephones and telegraphs of a municipal character;

To encourage and stimulate the industries of the district, introducing new ones by means of indirect aid;

To create and regulate pawnshops and mutual benefit associations;

To divide the municipality into districts of not less than ten nor more than forty thousand inhabitants each;

To demand from the Union property belonging to the municipality;

To enter into agreements with contiguous municipalities regarding public works of common interest;

To protest before the national congress and the federal government against violations of the federal constitution, as well against abuses and illegal acts of the non-municipal authorities;

To promote the general welfare of the municipality and to guard the faithful execution of the laws.

As thus enumerated, the powers of the elective representative body of the federal district seem very ample; but there are important limitations to be kept in mind. The constitution itself, as has been seen, reserves to the national government the control of the police, higher education, and any other services which it may decide to reserve for the federal authorities. Moreover, it has even been questioned whether the federal district enjoys the power of imposing an export tax on its own products, but that question has been resolved by the federal supreme court, which held in two decisions in 1918 (accórdãos Nos. 3,364 and 3,365) that the federal district enjoys this power even as regards its own products intended for exportation to other parts of the Union. Under the law of September 30, 1893 (No. 191 A), the federal district surrendered its right to levy taxes on industries and professions to the national government, which in return therefor assumed all the expenses of the courts, the police, and the fire department in the district. The tax on the transfer of property, which was likewise included in the terms of that law, was later returned to the federal district for collection.

But more important than the limitations imposed upon the jurisdiction of the municipal council by reason of the powers assumed by the national administration are the limitations resulting from the powers of the prefect, whose important rôle in the government of the district is reflected even in the enumeration of the functions of the council. This official is to all intents and purposes an agent of the national president, by whom he is appointed and removed.

In another connection attention was called to the constitutional question that has been raised regarding the appointive character of municipal prefects in the municipalities of the states, under the requirements of article 68 guaranteeing municipal autonomy. The same considerations apply, in the opinion of various Brazilian jurists, to the case of the federal district, the autonomy of which is in their opinion negatived by the creation of a prefect responsible solely to the national administration.[1] But the law of 1892 made provision for a prefect appointed by the president of the republic, with the approval of the senate, for four years. The definite term was subsequently changed to read "during good behaviour." In the reorganization of 1902 nothing was said about the term of the prefect, but in the consolidation of 1904 the term "during good behaviour" was again employed. This was apparently erroneous, since this expression had been eliminated in the law of 1902 and did not properly belong in a consolidation of existing laws. In fact, as well as in strict theory, the prefect is removable at any time by the president, and is, therefore, in every sense his agent, even the confirmation of his appointment by the senate having been eliminated.

[1] Araujo Castro, *op. cit.*, p. 189.

The prefect is called the executive power of the municipality, and he is that in every sense of the word. He executes the measures of the council, collects the revenues, authorizes the expenditures, appoints, suspends, and removes the administrative officers and employees of the municipality, and in general performs all executive and administrative functions. But his powers extend much farther than this. In the legislative field he has the sole power of initiative for all revenue and appropriation measures and may continue the existing budget in force if the council has not voted a budget by the last day of December. He also has the sole initiative in regard to the creation or suppression of municipal posts and the exercise of the borrowing power, as well as measures involving increases or diminutions in pay. This alone gives the prefect the directing hand in all the most important activities of the municipal council.

In addition, the prefect may suspend all laws and resolutions of the council by veto when he considers them unconstitutional, in conflict with federal laws, violative of the rights of other municipalities or of the states, or contrary to the interests of the federal district itself. This veto must be indicated in writing within five days, failing which the measure will stand approved. But the municipal council has no power to override the veto, which is sent to the federal senate. To be overridden there a vote of two-thirds of the senators present is required. Instances of a prefectoral veto being overridden are by no means unknown, but considering the relation between the national administration, of which the prefect is a personal representative, and the senate, and the extraordinary vote required to override the veto, this is almost an absolute power in the hands of the prefect.

Finally, the prefect has the customary ordinance and regulatory power which is characteristic of all executive officers in Brazil and which amounts to a very considerable power of supplementary and detailed legislation. It is not too much to say that under this system the real governing authority of the federal district is the appointive prefect, not the elective council. The law even stipulates that in case of the nullity of elections or of any other major force preventing the composition or functioning of the municipal council, the prefect shall administer and govern the district in accordance with the law in force, a situation which has already occurred in fact.

In each of the districts into which the municipality may be divided by the prefect, there is a prefectoral agent responsible to him, assisted by municipal guards to the number required for the proper performance of the public service. The police and fire departments of the district, as has already been noted, are administered by the national government directly.

The administration of justice in the federal district is another branch of the government which is organized and directed by the

national government, though not forming part of the federal judiciary within the meaning of the judiciary articles of the constitution. This judicial organization was first established by decree No. 1,030, of November 14, 1890, of the provisional government, and was reorganized by law No. 1,338, of January 9, 1905, with a subsequent modification by decree No. 9,623, of December 28, 1911.

At the bottom of the hierarchy there are 15 prætors, 8 for civil and 7 for criminal cases, the district being divided into 8 judicial precincts, with a civil and a criminal prætor or justice in each one, save that two of the precincts are served by a single prætor for criminal cases. These judges, like all the judges of the federal district, are appointed and paid by the national government and hold office for life. They have administrative functions and a subordinate jurisdiction, with appeal to the law judges. Of these there are 16, 6 for civil cases and 6 for criminal cases, 2 for orphans and absentees, 1 for probate, and 1 for cases involving the municipal treasury.

At the top is a court of appeals of fifteen members (*desembargadores*), divided into a supreme council and a first, second, and third chamber. The court of appeals has jurisdiction over cases brought up from the law judges in cases in which the latter have original jurisdiction. There is also in the federal district a jury for certain classes of criminal cases, consisting of 22 jurors presided over by a criminal law judge. For each session of the jury 7 are selected to act.

The public prosecutor's or attorney-general's department (*ministerio publico*) consists of a *procurador geral,* 1 prosecutor for each criminal district, and 7 assistant prosecutors, 1 for each of the criminal prætors.

The above organization corresponds to the judicial organization in each of the states, and is distinct from the two federal district judges and the federal prosecutor's department in the federal district.

THE FEDERAL TERRITORY OF ACRE.

The constitution of Brazil, like that of the United States, fails to make express mention of the power to acquire territory. In fact, the prohibition contained in article 88 against a war of conquest under any circumstances may be regarded as directly forbidding the acquisition of territory by means of the war power, a possibility which is permitted under the judicial interpretation of our constitution and which has actually been employed in some of the later additions to our national territory. But the power to acquire territory by treaty is recognized as residing in the national government of Brazil, as it is conceded to the national government in the United States.

When the Brazilian federation was created there was no territory not included in one of the existing provinces that were erected into states, except the so-called neutral municipality of Rio de Janeiro,

which was converted into the federal district. The problem of the government of federal territories did not, therefore, arise until the treaty of Petropolis, of November 17, 1903, with Bolivia gave Brazil title to a disputed region of some 60,000 square miles in the upper Amazon basin. The state of Amazonas lays claim to this region, but ever since 1904 it has been administered by the federal government as its only territory.

The first measure organizing the government of the new territory was passed on February 25, 1904, supplemented by the decree of April 7 of the same year. Various subsequent measures were passed by the federal government, the latest reorganization and consolidation being contained in decree No. 14,383, of October 1, 1920, expedited in virtue of law No. 4,058, of January 15 of the same year.

The government of the territory is intrusted to a governor appointed by the president of the republic and removable by him at will. He has general charge of all administration, civil and police, and may issue instructions for the faithful performance of the federal laws. The president of the republic also appoints three vice-governors to serve in case of the disability of the governor. He is assisted by a secretary-general, appointed and removable by him, and a chief of police appointed and removed by the president of the republic.

The territory is divided into 5 municipalities, the 4 departments into which the territory had formerly been divided with a prefect at the head of each, responsible to the president, having been abolished. Each municipality is governed by an elective council of 7 members (*vogaes*), as the deliberative body, and an intendent, appointed and removable at will by the governor, as the executive authority. The government of the municipality is declared to be autonomous within the sphere of its proper action, but the relation between the elective council, chosen for 3 years, and the appointed intendent is much the same as that existing in the federal district, save that the municipal council in Acre may override the executive veto by a two-thirds vote. Within the different districts of the municipalities the intendent is represented by agents appointed and removed by him.

The local judiciary of the territory comprises justices of the peace, the number to be fixed by the governor, 11 municipal judges, 5 law judges, and a court of appeals of 3 members. All the judges are appointed by the president of the republic, under certain restrictions, and the justices of the peace are named by the governor. The last-named serve for 3 years at a time, the municipal judges for 4 years, and the others enjoy life tenure. There are also 5 jury courts presided over by the 5 law judges, respectively, 15 jurors being selected, of which 5 constitute the jury for each session. There is also a *procurador geral,* 5 public prosecutors, and 6 assistant prosecutors, all appointed by the president of the republic.

The federal judiciary proper is represented in the territory by a district judge, with substitute and alternates, a *procurador* with assistants, and a jury of 12 selected from a panel of 24.

The government of the territory of Acre is, therefore, virtually a replica of the government of the federal district. But as the territory is largely a wilderness, with less than a hundred thousand inhabitants, the slender resources of the municipalities have to be supplemented by subsidies from the national treasury. The national government derives an income chiefly from the export tax on rubber, which is the principal product of the region.

CHAPTER X.

CONCLUSIONS.

If anyone should start out with the avowed purpose of discrediting the governmental system of Brazil, it would be an easy matter to condemn the constitution and government of that country, lock, stock, and barrel, out of the mouths of Brazilian critics themselves. Many there are who criticize the basis of the electorate and the electorate itself, others are loud in their condemnation of the politicians, still others bemoan the inefficiency and corruption of the public servants, administrative and judicial, while there are not lacking those who regret the abandonment of the parliamentary system, and those who believe the adoption of the federal system itself was a grave mistake from which flow the present ills of the nation. It is not impossible that there may still be alive statesmen of the old *régime* who even lament the substitution of republican for monarchical government, though the voices of these are not raised in public.

But what country is not without these iconoclasts? I am not speaking, of course, of socialists, communists, bolshevists, or anarchists, who in all countries raise their protests against the existing order of things, nor do I refer to the criticisms of disappointed seekers after political preferment, who are ready to blame the existing government not only for all political ills but also for too little rain or too much heat or any other destructive natural phenomenon such as an earthquake or a flood. I refer to the more or less sober and impersonal criticisms of objective students of the governmental system.

Out of the writings of such critics the French administrative system, which we in America commonly admire and deem worthy of imitation, can be condemned from root to branch. Similarly, the British system of parliamentary and party government can be damned through the comments of its native critics. In like manner the weaknesses and abuses of our American governmental system, from the national government down to the municipal ward or county district, have been held up to deserved condemnation, and the most cherished of our political institutions, from the United States supreme court, with its composition of life-term judges and its ultimate power of declaring executive and legislative acts invalid, down to the rotation in office of local officials, have been severely criticized, some critics going to the length of wanting to abandon our presidential form for the parliamentary form, which exists in France and which prominent French publicists think should be given up in favor of the American presidential form.

It would be manifestly incorrect, misleading and unfair, however, to pyramid the criticisms directed against the various features of a given government into a wholesale condemnation of its entirety; for while the critics may all be agreed as to the desirability of some change, they are by no means at one regarding the changes desired, and the very feature that receives the unqualified condemnation of one reformer may appeal to another as eminently worthy of retention.

Nevertheless, it may not be without value to examine the criticisms made by an eminent student of the Brazilian system and to emphasize those features which have received pretty general condemnation, as a basis for forming a judgment based on personal observation and a comparative point of view. The difficulties and dangers in the way of a foreigner's forming a sound estimate of the political institutions of a country, even after a year of residence and study, and though he were endowed with phenomenal powers of observation, an inexhaustible fund of information in governmental matters, and unquestionable soundness of judgment, are so great as to make it little short of presumptuous for one not so favored even to attempt it. The only compensating merit which he can bring to such a study is the total lack of partisan and personal prejudices as between the issues that agitate the men who have grown up with the system under which they live.

Critical studies by Brazilians themselves of the actual operation of their governmental system as a whole have been surprisingly few, though studies in public law are numerous and monographs on particular phases of the governmental system are many. Of such general studies, one of the best known is that of Amaro Cavalcanti, *Regimen Federativo e a Republica Brazileira,* published in 1900. This work was finished on November 15, 1899, just ten years after the proclamation of the republic, and it deals with the difficult and troubled period of adjustment. Its conclusions are, therefore, by no means necessarily applicable to the situation to-day, when more than a score of years have elapsed, a period in which the material development of the country has been phenomenal and during which an equally marked development in governmental affairs might easily have occurred. On the other hand, the period which he describes was the formative period of the new *régime,* and in national life, as well as in the lives of individuals, habits once formed, especially, it seems, bad habits, are very difficult to break. We need only to recall in our own experience the vicious spoils system in politics, which, flowering a hundred years ago, is still dropping its rotten fruit in the garden of our political life.

Amaro Cavalcanti was a member of the republican constituent congress of 1890, where he observed the evils of the old *régime,* and was later a leading member of the supreme court of Brazil. When, there-

fore, in the work in question, he devotes a chapter to "The Major Ills of the Republic," he speaks with considerable authority, if not with impersonal calm. Nothing more than the mere indictment can be reproduced here, for lack of space, but the author himself is careful in all cases to submit the specific evidence on which his indictments are based.

Under the head of "Abuses Practised by the Federal Authorities," the author enumerates the dissolution of the congress by the president on November 3, 1891, and the equally violent deposition of the state governors who acquiesced in this act by the vice-president who succeeded on November 23 of the same year, which inaugurated the practice of federal deposition and installation of state and municipal authorities that was so generally practised up to the time of the revolution of September 6, 1893. In this connection he cites also the action of the national congress in authorizing the vice-president in question to fill out the four-year unexpired term of the president who resigned on November 23, in manifest violation of the requirement of article 42 of the constitution, which demanded a new election when the vacancy occurred during the first two years of the presidential term. Equally unconstitutional was the act of the same executive in arresting and deporting various members of the national congress under the state of siege declared on April 10, 1892, a fatal precedent that was followed on more than one subsequent occasion, with like approval of the congress.

In further criticism of the conduct of the national congress, this author deplores alike the undignified and slanderous recriminations directed by members against each other or against the representatives of the executive branch of the government, and the blind subjection and subordination of the legislature to the demands of the executive, without investigation or judgment, in derogation of the independence of the former. The active intelligence of the congress, so noticeable in the enactment of bills of individual or class interest, has not been directed with persevering patriotism to the passage of laws which clarify the duties, rights, and relations of the states and the Union with each other. Likewise reprehensible is the consistent refusal of the congress to submit any of its members, accused of no matter what crime, to be judged therefor before the ordinary courts of law.

As regards the executive power, the author declares that if it has already been deserving of censure for its blameworthy intervention in the states for the purpose of imposing on them, more than once, the rule of designated individuals or factions or for other mistakes and excesses, no less is it to be censured for its persistent omission to insist on the faithful execution of the federal constitution and laws throughout the whole extent of the federation. No one is ignorant of the disrespect and the frequent violations which these suffer at all times

on the part of the executives and other authorities of the states, certain, absolutely certain, that as a rule no restraint will be exercised by the central government in that connection. In the state department of the national government there are countless documents and complaints, denouncing such infractions, some of the gravest character, that violate the federal republican form of government, the purity of federal elections, the administration of justice, and other constitutional rights and guaranties of equal importance; and yet, rare are the occasions on which the executive has performed his entire duty in view of the circumstances. In a few such cases the executive might be able to excuse himself on the ground of the lack of specific authority by law to act, but in most of them that excuse will not avail.

Even the judicial power of the nation, continues the author, which should stand as an example of the greatest rectitude, has not shown itself wholly free of the uncertainty, the lack of diligence, and the abuses of which the political branches of the government have been guilty. In certain cases the judicial branch has failed to restrict itself to its proper sphere as a coördinate branch of the government, constituting an obstacle in the way of the other two branches within their peculiar spheres; in other cases, which is even more serious and prejudicial, it has failed to act with consistency in its decisions on constitutional questions of the greatest importance. Examples of the first-mentioned class of mistakes have occurred chiefly on the part of the federal judges of first instance, issuing injunctions and similar processes against the orders or regulations of the federal administration, especially against determinations of the treasury department, in cases where the constitution and laws endowed the administration with discretionary powers, which are not properly subject to revision by the courts. Of the second class of errors, leaving the status of the law in doubt, are the many conflicting decisions of the supreme court, especially on questions of interstate taxes and the state of siege. The most striking example of a case of the latter sort was the decision of April 16, 1898, which flatly reversed the decision of the same court in the same case decided on March 26, twenty-one days before.

No less explicit is the author in his condemnation of the abuses of power practised by the state authorities in the first decade of the republic. Not only have the state constitutions, laws, and governmental practices assumed or exercised powers that did not properly belong to them under the system established by the federal constitution, but the state authorities have violated as well the provisions of their own constitutions.

So there have been repeated instances of state governors removing from office the judges who were not sufficiently docile or who belonged to opposing factions, either under the guise of forced retirement or else by outright dismissal. The favorite means employed for thus

getting rid of judges, who not only by the state but also by the federal constitution were assured life tenure, have been amending the state constitution to permit such dismissal, or passing a law reorganizing the judiciary, with the result of reappointing only the judges acceptable to the governor. Again, the destruction of municipal autonomy by the state governors and legislatures has been all but complete, in spite of the express provisions of both federal and state constitutions.

In the domain of ordinary administration, innumerable have been the instances of measures of purely personal interest practised by the state authorities without the slightest regard for the public good, and even in flagrant disregard of the dictates of morality. On the one hand, the creation of sinecures and the granting of fat pensions, the exemption from taxation, and the concession of subsidies and favors or of lucrative contracts and jobs are the ordinary presents with which are rewarded good services rendered to friendly administrations. On the other hand, forced retirements, termination of employments, burdensome taxes on particular professions, businesses, or industries, or other difficult conditions are so many "legitimate" means of destroying the prestige or making difficult the action or the work of the political adversary. Especially in the realm of economic or financial matters has the action of the state administration at times reached the scandalous. Extravagance, dissipation, and even outright embezzlement have been pilloried in the public press and even brought before the courts in scandalous trials.

In the purely political field the conditions are no better and are even more generally acknowledged. Through the unconstitutional domination of the municipal governments the governor or president controls the electorate, for it is the municipal authorities that determine who shall appear on the voters' list and which of these shall be permitted to vote, how they shall vote, and how their votes shall be counted. Thus the municipal authorities, who are the creatures of the governor, make the elector, he makes the congress, the congress makes the laws, and the laws are the will of the governor, who thus concentrates in himself all the political power of the state, even to the point of setting aside the constitution.

As regards the selection of the state executive, that is also a matter of common knowledge. The governor chooses his successor, whom the electorate must approve or will be made to appear to approve by the means at the disposal of the government. Neither the constitution, nor the laws, nor the morality of the acts practised plays any rôle, but only the preservation of power in the hands of the dominant faction, with the result, of course, that the acts practised by a government so chosen are acts incapable of being questioned. Neither the protests of the press, which if need be is silenced by forcible means, nor the

powers of the judiciary, which is independent only in the dead letter of the constitution, are of any avail to remedy matters, and the intervention by federal authorities, which alone could remedy these abuses, is decried as an interference with the autonomy of the states.

Out of these facts grow the frequent disturbances of public order in the states, and even in the capital of the nation itself, involving acts of violence and calling in the participation of the military element, which, as the decisive factor in the establishment of the republic, has ever since been only too much inclined to arrogate to itself a determining voice in the political direction of affairs.

This is a dismal and discouraging picture which the eminent author paints at the end of the first decade of the existence of the federal republic. It may have been exaggerated even then, for he labored under the vivid impression of disturbing political events that had just recently occurred and were even at the moment occurring in the country. Since that time much water has flowed under the bridge, and even the most pessimistic of Brazilian publicists would not admit that this dark picture is a fair or faithful reproduction of conditions in the country to-day. It is true that almost every one of the indictments which Cavalcanti hurls against the actual operation of the governmental system can be heard repeated to-day in word or seen reproduced in writing emanating from one of the numerous critics of the system. But it is quite possible that much of this is handed down from one writer to another as a tradition, which is repeated over and over without renewed examination of conditions as they are to-day, or based on generalizations formed anew from one or another isolated case.

That one or another of the specific charges which the author in question makes are as true to-day as they were when he made them has already appeared from the exposition contained in this brief study. For instance, just to take an example which does not involve matters of opinion or the sifting of contradictory evidence, one may mention the uncertainty which flows from the vacillating practice of the federal supreme court on important questions of constitutional law, various instances of which have been pointed out in the text. Equally clear is it that the charges which the author brings against the state governments, such as that of financial debauchery, for instance, can not be brought to-day against the states as a whole, whatever may be true of individual cases.

The truth of the matter would seem to be that while there has been an astonishing development in the direction of improved governmental and political conditions in the generation that has passed since this bitter criticism of the Brazilian political system was launched by one of its founders and most profound students, the

practices and the point of view of the past can not be wholly thrown aside even in a generation. All students of Brazilian constitutional history agree that the corruption, malpractice, and lack of any popular participation in the government of the empire laid the heavy burden of depressing tradition on the political life of the new republic. To this unfortunate inheritance, the novelty of the *régime* instituted in 1889, the lack of experience in self-government of the people, the enormous extent of the territory, and its lack of means of transportation and communication all contributed elements which made it even easier for these abuses to flourish, or even for new ones to arise.

Even in the decade which Cavalcanti pictures so dismally, one can now discern at this distance of time a general progression, though perhaps halting and at times scarcely discernible. This movement has unquestionably continued with increased momentum down to the present time, but the dead hand of the past still lies heavy on the present. On the other hand, the very developments which may seem on their surface to indicate relapses or recurrences of an earlier disease may in reality be the final efforts of the body politic to throw off the last effects of the poison with which its system has been polluted.

It is in the light of these considerations that particular interest attaches to certain events which occurred in Brazil during the time this study was made. They are matters of common knowledge and must be examined not merely as interesting phenomena of the subject under consideration, but also because taken by themselves, especially in the form in which press reports present them, they appear to have quite a different significance than when viewed in connection with the preceding and concomitant events. These occurrences of the year 1922–1923, the hundredth year of Brazilian independence and the thirty-third year of the federal republic, most of which stood in intimate relation with each other, were the election of the national president, the military revolt of July 5, the federal intervention in the state of Rio de Janeiro, and the revolution in the state of Rio Grande do Sul. These events have been touched upon already in various other connections in the text, but they deserve additional consideration in this estimate of present-day conditions in Brazil.

The presidential campaign of 1922 presented several interesting features worthy of brief review. In the first place, it illustrated again the dominant rôle played by the two most populous states of the Union, São Paulo and Minas Geraes, in the national politics of the country. The political leaders of those two states agreed on the candidate to be approved by the congressional caucus in June, 1921, which assumed the disguise of a convention of the Republican Party, the only party existing in Brazil. These two states cast nearly three-fifths of the popular votes cast for the successful candidate, and almost as many as were cast for the defeated candidate in the country

as a whole. Under the present distribution of wealth and population in the country, it seems likely that the presidents of Brazil will continue normally to be selected from among the presidents or past presidents of these two states, a situation that can not fail to impress the national politics of Brazil with a peculiar stamp.

In the second place, this campaign showed that a forceful and energetic opposition candidate with a popular rallying cry can make a powerful campaign and gather a very respectable number of votes, in spite of the supposedly impregnable position of the official candidate and the legal and extra-legal weapons of which he disposes. Of no less interest are the considerations which seemed to account for most of the unquestionably formidable opposition developed, which appeared to be principally a feeling of hostility in military circles aroused by the real or supposed aspersions cast by the majority candidate on the political activities of that branch of the public service. This latter feature was destined to play a fateful rôle in the later developments of July of the same year.

One of the common criticisms (encountered again and again in discussions of politics in the Latin-American countries, inclusive of Brazil) is that they lack parties and political issues other than those of a personal nature. Organized political parties as we know them in England and in the United States are lacking in Brazil, it is true, but the two-party system in the United States as well as in England is purely a historical accident, as is the lack of a party system in Brazil. The economic issues of slavery and tariff protection, with their political concomitants culminating in the Civil War, created two great parties in the United States, which have continued unshaken long after any fundamental issues ceased to exist which differentiated them. In the same way in England, the historic Liberal and Conservative parties, with their successors, remained determining factors in politics long after the traditional lines of separation had become blurred or even wholly wiped out. In Brazil, on the other hand, the historical Republican Party, which paved the way for the overthrow of the empire, solved at one blow the big political question that agitated the country and remained not merely triumphant but unopposed in the new order of things. Anyone who will read the platforms of our two great parties during the last twenty years will see how utterly impossible it is to discover any fundamental planks on which they differ. The people of the United States vote for the most part for the party to which they and their fathers belonged, and the independent voters switch from one to the other because they are dissatisfied with the course of events, from party appointments to the weather and the crops, under the preceding administration. There may be a distinct political advantage in having a well-organized opposition group ready to supersede a dominant group when the latter

no longer gives satisfaction, as is true in the United States and England. But the existence of such a group is the result of historical and more or less fortuitous conditions which did not happen to have occurred in the development of Brazil. But so far as dividing along fundamental and clear-cut issues of national policy is concerned, there is just as much of that, or rather just as little of that, in Brazil as with us or in England. The campaign of 1922 certainly showed that principles rather than personalities could develop a very powerful opposition.

The military revolt of July 5 and 6 of the presidential year can not be passed over as insignificant merely because it was quickly suppressed and resulted in only a brief disturbance of public order and few casualties. While all friends of Brazil rejoiced in the rapid collapse of the attempted revolution and are inclined to minimize its importance, no student of Brazilian political institutions can be satisfied without attempting to find an explanation for this unfortunate occurrence. A similar event would be unthinkable in the United States or in England. Why could it occur in Brazil? Here, again, the roots of the present lie buried in the past. It was the dissatisfaction of the army with the treatment meted out to it in the closing years of the empire that prompted it to make common cause with the Republicans, and it was the revolt of the army which converted the republic into an accomplished fact while Emperor Dom Pedro was in the very act of saying: "This is nothing; to-morrow all will be over; the Brazilians are that way." The influence and prestige of the army had been steadily declining since the days of the Paraguayan war in 1870, but with the new order of things the military took the undisputed upper hand. A marshal of the army was the first president, another marshal succeeded him, the military element was dominant in every way, higher military posts were multiplied, salaries were increased, and army officers occupied not only legislative but executive posts. Under those conditions it was a real triumph for the civilian element when the first popular election in 1894 put a civilian president in the chair.

But the military element continued to regard itself more or less the "father of the republic" and took a prominent part in the politics of the country, instigating revolts on more than one occasion and issuing pronunciamentos at various times. It was against this military control of politics that Ruy Barbosa became a candidate against Marshal Hermes da Fonseca in 1910, and his supporters claimed that it was only by fraud and military intimidation that he was defeated. Since that time many Brazilian statesmen have decried the participation of the military element as such in the politics of the nation. Particularly pernicious were the activities of the *Club Militar,* an organization of army officers in Rio de Janeiro, directed by the same Marshal Hermes

who was president of Brazil from 1910 to 1914. The real or supposed hostility of Dr. Arthur Bernardes towards the military was the ground of the organized opposition of the latter to his candidacy in the elections of March 1, 1922. Marshal Hermes himself was emphatic in his demand for a court of honor to canvass the election results instead of leaving it, as the constitution provides, to the congress. It was this same Marshal Hermes, as president of *Club Militar,* who a little later directed a message to the government forces in Pernambuco, where disturbances were occurring, which was interpreted by the president of the republic as counseling insubordination. A message of censure directed to the marshal was torn up and returned to the minister of war without being read. In consequence of this overt act of insubordination the marshal was ordered under arrest, and it was this arrest which was the immediate cause of the raising of the flag of revolt by his son, Captain Euclydes da Fonseca, in the fortress of Copacabana, which dominated the city. But though this may have been the match that set off the actual overt acts of rebellion, culminating in the shelling of the city by the revolutionary fort, far-reaching preparations for a simultaneous military revolt throughout the entire country preceded these events, with the avowed purpose of making Marshal Hermes military dictator to prevent the assumption of power by Dr. Bernardes, who had meanwhile been constitutionally proclaimed the next president by the national congress.

In other words, the military revolt of July 5 and 6, fortunately defeated in its inception by the energetic measures of Dr. Epitacio Pessoa, was only another and desperate attempt by the military politicians to control the country. Judged by the outcome, it was a senseless and hopeless endeavor, and while in essence it was a new outbreak of an old disease, it may well have had the merit of purging for all time the latent poison that was still at work. If so, and there is every reason to believe it was so, it is rather the evidence of a now completed cure than the manifestation of a lingering ill that may break out again at any time. Certain it is that practically all elements of the population, military as well as civil, opponents of president Bernardes as well as his supporters, united in condemning this violent outbreak and in lauding the energetic measures of the government. Many of the former supporters of Dr. Peçanha even, who had a powerful body of friends and admirers, withdrew their support, because it was suspected that he had been intimately connected with the outbreak.

It was this outbreak which led to the declaration of the present "state of siege," declared by the president in the capital and the neighboring state of Rio de Janeiro, the home of Senator Peçanha and a focus of revolutionary activity. With the declaration of the state of siege not only the entire congress but public opinion in general

was in perfect accord. Less complete was the agreement in the necessity or wisdom of continuing the state of siege by subsequent extensions long after all disturbance had apparently ceased, with the result of keeping under arrest without trial the people who had been involved or were suspected of being involved in the revolt, and with the further result of keeping up the censorship of the press. The government justified this continuation of the state of siege, the exterior manifestations of which were limited to these two aspects, on the ground that it was necessary in order to make the investigations and gather the evidence bearing on the responsibility of those involved, and to keep the papers from inflaming the public mind with violent attacks upon the government. An outsider is, of course, wholly unable to form a sound judgment as to the force of the arguments adduced by the government, but it illustrates very clearly one of the most dangerous aspects of this extraordinary power, that for all practical purposes the executive is the sole judge of the necessity or desirability of continuing the state of siege, and that if he should be inclined to use his power for the purpose of persecuting innocent prisoners or of muzzling the press, there is no way in which public opinion or considerations of justice can make themselves felt.

The most recent example of intervention in the affairs of a state is also more or less intimately connected with the events heretofore described. The state of Rio de Janeiro is the home of the defeated candidate for the presidency, Dr. Nilo Peçanha, and cast an overwhelming vote for him in the election. It was, moreover, the seat not only of much of the revolutionary plotting preceding the events of July 5, but also of a heated, not to say violent, state election in November of the same year. As a consequence of this election two legislative bodies claimed to be functioning and two sets of candidates claimed to be entitled to the office of president and vice-president of the state, respectively. One, of course, was the candidate of the faction with which Dr. Peçanha was allied, and the other was the candidate of the opposition. There was much talk of fraud and duress in the elections and many violent measures were taken by both factions.

In view of the duality of legislatures and of claimants to the executive offices, President Bernardes, in the closing days of the congress, submitted to that body the question of federal intervention. Then came the *habeas corpus* of the supreme court in favor of Dr. Raul Fernandes, declaring him entitled to take office on December 31. In consequence, the president of the republic accepted the unprecedented action of the supreme court, which has already been discussed elsewhere, and the candidate in question was declared seated. But disturbances continued throughout the state, and the president, considering that the writ of the supreme court had been fulfilled when

Fernandes actually took office, declared that events had demonstrated that the disorder and lawlessness resulting from the inability of the president to enforce his power again called for intervention, and so on his own authority, the congress having meanwhile adjourned, he appointed a federal intervenor to take over the administration of the state. Whatever may have been the justification for this act of intervention, and however much the state itself may have profited by having law and order instead of anarchy and violence, it was unfortunate that the issues in this case should have been so intimately bound up with the events of the presidential campaign of 1922 and military revolt of July 5.

But it is obvious that both of these interesting instances of extraordinary powers exercised by the national executive, the state of siege and the intervention in the state of Rio de Janeiro, were the direct outgrowth of exceptional conditions. They can hardly, therefore, be regarded as precedents which would have weight in later manifestations of these powers, which all Brazilians are agreed should be restricted to the smallest possible scope, in the interests both of individual liberty and of state autonomy. The same considerations apply to the action of the federal supreme court in departing from its general policy of not attempting to settle political questions by the exercise of its power to issue writs of *habeas corpus*. The occurrences of abnormal times can not fairly be taken as indicative of the regular run of events.

Most curious, perhaps, of all the happenings of this eventful year in Brazil is the revolution now in progress in the state of Rio Grande do Sul. Here again the spectator is handicapped by a lack of complete or even accurate information as to the actual occurrences. But the general situation and significance of the events are less obscure. The outstanding facts are that in the elections held this year the successful candidate is the man who since 1898 has with one interruption held the presidency of the state against all attempts to defeat him. The constitution of the state permits reëlection, provided the incumbent receives the vote of three-fourths of the electorate. But the constitution also makes the president much more powerful in that state, even, than he is, as a general rule, throughout Brazil. Obviously, such a president has legal and extra-legal means of controlling elections which are well-nigh invulnerable even with the three-fourths-majority requirement. In fact, if improper means are used, as has been claimed by his opponents, it is hardly any more difficult to get a three-fourths majority than a simple majority.

When after a heated campaign the returns showed Borges de Medeiros to have been reëlected for a fifth term of five years, the opposition was emphatic in its accusations of duress and fraud, and insisted that the incumbent had not received the necessary majority,

even with all the means at his command. The opposing candidate himself, like the incumbent, a representative of the state in the republican constituent convention of 1890 and a publicist of note, appealed to the president of the republic to act as arbitrator in the controversy, an honor which the president declined. There was, therefore, no hope for the opposition except to resort to violence, with the expectation, it was generally supposed, of inducing the federal government to intervene and settle the dispute. But so far the revolutionary disturbances have continued and the federal government has kept hands off except for the purpose of protecting federal property and services.

Whatever may be the outcome of the present situation and whatever may be the real merits of the controversy, it seems clear that where a single man can remain in power for thirty years there is a denial of popular government, whether that denial is the result of constitutional and legal provisions or whether it is the result of extralegal and unconstitutional means. All the other states of Brazil except one (Pará) prevent the immediate reëlection of the executive, and though it is commonly admitted that the presidents play a determining rôle in the selection of their successors, this is not nearly so dangerous as to permit him to succeed himself term after term. As a protest, in fact as the only possible protest, against the system which permits a thirty-year dictatorship, the revolution in Rio Grande do Sul may serve a useful purpose, damning as it is in the eyes of the world at large. The national government intervened in the neighboring state of Rio de Janeiro, where the disturbance of public order was not nearly so serious as it has been in Rio Grande do Sul. It might have been better to run the risk of being charged with improper interference in state affairs by settling this controversy in that state also rather than leave the opposition only the desperate and extreme remedy of violence, with all that that involves.

This rapid muster of the chief events of the year 1922–1923 will suffice to show that some of the serious ills of the republic of which Cavalcanti complained in 1899 are still present, though unquestionably in the process of elimination.

Of the constitutional reforms in the federal government which the various adherents of the "revisionista" school champion, it is not possible to speak here. As a general rule their tendency seems to be in the direction of still further enlarging the domain of the federal government, though there are not lacking those who think that the states should be given more rather than less powers. The federalization of procedural or adjective law has been widely advocated, and to a less extent the unification of the courts as well. Others favor the control of public health and primary instruction by the federal government, while still others argue for the control by the federal government of the powers of the states and municipalities to contract foreign

loans. But on the whole it seems to be the prevailing opinion that Brazil is in need not so much of constitutional changes, with their resulting agitation, as of a faithful and patriotic execution of the constitution as it stands, a sober and conservative view which has particular merit in a country where a wholly new *régime* is but now entering upon its fourth decade of existence.

The fundamental functions of government, those of protecting life, health, and property, are administered by the governments of the individual states, as is also the important matter of elementary instruction. Now one of the most striking features of the Brazilian federation is the enormous disparity between the various states in the matter of area, population, and economic resources. These differences are inevitably reflected in the efficiency with which these fundamental concerns are administered. Some of the states are economically so undeveloped that they are able only with the greatest difficulty to meet the minimum expense required for the organization and functioning of a very rudimentary government. In such states it is quite possible that the population would benefit by having the central government do for them what their own governments can not. On the other hand, the more wealthy, thickly populated, and progressive states are administering their affairs better than could be done by a distant central government. The former would gain and the latter would lose by an extension of the federal field of action, given conditions as they are. The best solution, therefore, would seem to be the one now being followed, namely, that of federal aid or subsidy to the states in matters of health and education. In this way the weak states can greatly improve their condition by the aid of federal grants, and the strong and self-sufficient states can retain their independence of action and the direction of their destiny.

The same is true of the more positive and constructive phases of governmental action; the development of natural resources, the stimulation of transportation, and the encouragement of agriculture. Some of the states are both able and willing to take the necessary steps. Others are inevitably dependent upon the assistance and even the initiative of the federal government. There is, of course, the obvious danger of creating a permanent attitude of dependence on the part of the states, with the obvious concomitant of permanent direction by the federal government. On the other hand, these measures of development will themselves result in giving the states so helped an economic strength that will enable them to stand alone, and local patriotism and pride may perhaps be counted upon to discard the perambulator when they are fully conscious of the power to walk by themselves. At any rate, the only alternative is stagnation for the present and for an indefinite time in the future. Under such condi-

tions, theoretical considerations of state autonomy and local pride must perforce yield to imperative necessity.

Social legislation, which unquestionably falls within the sphere of the federal government in its control over civil and commerical law, is still in its infancy in Brazil. Industry has not developed sufficiently to make the factory worker a force in the land, especially as he naturally belongs to the class which is excluded from the franchise. But the condition of the agricultural laborers, who constitute the bulk of the proletariat, is sorely in need of protection and improvement. They are in some cases, it is true, not worth even the pitiful wages many receive; but if they were protected in their health, saved from the curse of alcoholism, and given educational opportunities, all that would be changed.

Senator Alfredo Ellis, from the state of São Paulo, one of the patriarchs of the senate and an ardent apostle of the federal republic during the closing decades of the empire, as well as a member of the constituent convention, voiced the opinion of many of the leaders of authoritative opinion in Brazil when he said that the three greatest curses of the nation are gambling, alcoholism, and illiteracy. He might have included them all under the last head, for only education can be counted on to eliminate the first two. In a nation where from 75 to 80 per cent of the population are illiterate, everything depends for its ultimate improvement on the remedying of that condition, and almost all the ills, economic, social, and political, from which the country suffers may be laid principally at the door of that situation.

Brazil was wise in disqualifying the illiterates from the suffrage, thus avoiding a mistake for which we in the United States have paid dearly. But no country can lay claim to the title of a democracy in which a condition is allowed to continue indefinitely that makes it necessary to exclude 80 per cent of the adult male population from the right to vote. It is unfortunately true in Brazil, as it is in the United States, that some of those admitted to the suffrage are either indifferent or are open to corruption. Ability to read and write is no guaranty of personal or political righteousness; but that the general level of popular government can be improved only by means of popular education is accepted as axiomatic.

If there is much to be improved in the government of Brazil, and the ablest and most patriotic of Brazilians are the first to admit that this is so, there is also much that is worthy of the highest admiration. The difficulties with which that nation has had to contend in meeting the problems of the federal republic have been enormous. The economic, social, and political conditions bequeathed to the young republic by the empire were appalling in their complexities. These conditions have been attacked with a patriotism and an energy that have overcome almost insurmountable difficulties. The ablest, the

best-trained, and the most energetic of her sons have devoted themselves to the task with untiring patriotism. To an American, the most awe-inspiring feature of the development of the republic is the deep admiration which the leaders of public thought in Brazil have had for the political institutions of our own land. It is a great responsibility to be held up as a model, as we have been by the framers of public opinion in Brazil. No bigoted national pride has prevented the Brazilians from turning to other nations for their constitution, for their legislative principles, and for their technical advice. An American naval mission is now assisting Brazil in reorganizing her navy, and American experts are assisting in developing her mineral and agricultural resources. The Rockefeller Commission of the International Health Board is aiding her in the solution of the great problems of public health that confront her, and the American public school system is the model which she is striving for in that field. Of the ultimate attainments of a nation as great as Brazil, which is not too proud to seek aid and advice wherever it is to be found, there can not be the slightest doubt. With such a spirit, the magnitude of the tasks that confront her, already greatly reduced in perspective by an examination of what she has accomplished, assumes proportions that come well within the possibilities of rapid achievement.

APPENDIX NO. 1.

Constitution of the Republic of the United States of Brazil Promulgated on February 24, 1891.

We, the representatives of the Brazilian people, meeting in constituent congress, in order to organize a free and democratic *régime*, do establish, decree, and proclaim the following

CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL

TITLE I. THE FEDERAL ORGANIZATION.

PRELIMINARY PROVISIONS.

ART. 1. The Brazilian nation adopts, as its form of government under the representative *régime*, the federal republic proclaimed on November 15, 1889, and constitutes itself, by the perpetual and indissoluble union of its former provinces, as the United States of Brazil.

ART. 2. Each of the former provinces shall constitute a state, and the former neutral municipality shall constitute the federal district, continuing as capital of the union as long as the provisions of the succeeding article are not put into effect.

ART. 3. There remains to the union in the central plateau of the republic a zone of 14,400 square kilometers, which shall be marked out at the proper time in order to establish therein the future federal capital. When the transfer of the capital shall have been accomplished, the existing federal district shall constitute a state.

ART. 4. The states may unite with one another, subdivide, or partition themselves for annexation to others or to form new states by means of acquiescence of the respective legislative assemblies, in two successive annual sessions, and of approval by the national congress.

ART. 5. Each state is bound to provide at its own expense for the necessities of its government and administration; but the union shall render aid to the state which in case of public calamity requests it.

ART. 6. The federal government may not intervene in the affairs peculiar to the states, except:

1. To repel foreign invasion or that of one state in another;
2. To maintain the federal republican form;
3. To reëstablish order and tranquillity in the states, upon requisition of their respective governments;
4. To assure the execution of federal laws and judgments.

ART. 7. The union has exclusive jurisdiction to impose:

1. Duties upon imports of foreign origin;
2. Duties of entry, clearance, and stay of ships, coastwise trade being free to national goods, as well as to foreign goods that have already paid import duties;
3. Stamp taxes, saving the restriction in art. 9, sec. 1, No. 1;
4. Federal postal and telegraph rates.

SEC. 1. The union shall also have exclusive jurisdiction over:

1. The establishment of banks of emission;
2. The creation and maintenance of custom-houses.

SEC. 2. The imposts created by the union shall be uniform throughout all the states.

SEB. 3. The laws of the union, the acts and judgments of its authorities, shall be put into execution throughout the country by federal officials; the first-men-

tioned may be entrusted, however, for execution to the governments of the states, with their assent.

ART. 8. The federal government is forbidden to create in any manner distinctions or preferences in favor of the ports of some of the states against those of others.

ART. 9. The states have exclusive jurisdiction to impose taxes:

1. On the exportation of goods of their own production;
2. On rural and urban real property;
3. On the transfer of property;
4. On industries and professions.

SEC. 1. The states also have exclusive power to impose:

1. Stamp taxes on documents issued by their respective governments and on affairs of their own economy;
2. Charges relating to their own telegraphs and posts.

SEC. 2. The products of other states are free of duties in the state through which they are exported.

SEC. 3. A state may impose import duties on foreign goods only when destined for consumption within its own territory, the proceeds of the duties reverting, however, to the federal treasury.

SEC. 4. The right is reserved to the states to establish telegraphs between the various points within their territories and between these and points in other states that are not served by federal lines, the union having the power to expropriate them when demanded by the general good.

ART. 10. The states are forbidden to tax the federal property and revenues or the services controlled by the union, and vice versa.

ART. 11. Both the states and the union are forbidden to:

1. Impose taxes, on the transit through the territory of a state or in the passage from one state to another, on the products of other states of the republic or on foreign products, as well as on the vehicles of land or sea that carry them;
2. Establish, subsidize, or embarrass the exercise of religious worship;
3. Enact retroactive laws.

ART. 12. The union as well as the states shall have power to establish any other sources of revenue than those enumerated in Arts. 7 and 9, cumulatively or not, observing the provisions of arts. 7, 9, and 11, No. 1.

ART. 13. The rights of the union and of the states to legislate on railways and internal navigation shall be regulated by federal law. Coastwise traffic shall be carried on by national ships.

ART. 14. The land and sea forces are permanent national institutions destined for the defense of the country without and the maintenance of the laws within. The armed forces are essentially obedient, within the limits of the law, to their superior officers and obliged to support the constitutional institutions.

ART. 15. The organs of the national sovereignty are the legislative, the executive, and the judicial power, harmonious with and independent of each other.

SECTION I. THE LEGISLATIVE POWER.

CHAPTER I. GENERAL PROVISIONS.

ART. 16. The legislative power is exercised by the national congress with the approval of the president of the republic.

SEC. 1. The national congress consists of two branches: the chamber of deputies and the senate.

SEC. 2. The election for senators and deputies shall occur simultaneously throughout the country.

SEC. 3. No one may be at the same time deputy and senator.

ART. 17. The congress shall meet in the federal capital, independently of call, on the 3d of May of each year, if the law does not designate another day, and shall function four months from the opening date; and it may be extended, adjourned, or called in extraordinary session.

SEC. 1. The congress alone may determine the extension or adjournment of its sessions.

SEC. 2. Each legislature shall last three years.

SEC. 3. The government of the state in the representation of which a vacancy occurs, for whatever cause, including resignation, shall immediately order a new election.

ART. 18. The chamber of deputies and the senate shall function separately, and, if not otherwise determined by a majority vote, in open sessions. Decisions shall be reached by majority vote, there being present in each chamber an absolute majority of its members.

Each chamber shall have power to:

Verify and accept the credentials of its members;

Elect its officers;

Organize its internal government;

Regulate the service of its internal police;

Name the employees of its secretariat.

ART. 19. The deputies and senators are inviolable for their opinions, words, and votes in the exercise of their office.

ART. 20. The deputies and senators, from the time they receive their credentials until the new election, may not be arrested nor prosecuted criminally without prior permission of their chambers, except when taken *in flagrante* in a non-bailable crime. In that case, the proceedings having been carried as far as formal indictment, the prosecuting authority shall send the papers to the respective chamber to pass upon the admissibility of the charges, unless the accused elects immediate trial.

ART. 21. The members of both the chambers, upon taking their seats, shall make a formal promise, in public session, faithfully to perform their duties.

ART. 22. During the session the senators and deputies shall receive an equal pecuniary remuneration, and an expense allowance, which shall be fixed by the congress at the end of each legislature for the following.

ART. 23. No member of the congress, after his election, may enter into contracts with the executive power, nor receive from him commissions or paid employments.

SEC. 1. The following are excepted from this provision: (1) Diplomatic missions; (2) Military commissions or commands; (3) Preferments and legal promotions.

SEC. 2. However, no deputy or senator may accept appointment to missions, commissions, or commands specified in Nos. 1 and 2 of the preceding paragraph, without permission of his respective chamber, whenever the acceptance would result in the cessation of the exercise of his legislative functions, unless in case of war or cases in which the honor and integrity of the union are involved.

ART. 24. Neither may the deputy or senator be president or part of the directorate of banks, companies, or undertakings that enjoy privileges from the federal government, defined by law.

Failure to observe the stipulations contained in this and the preceding articles involves loss of the office.

ART. 25. The office of legislator is incompatible with the exercise of any other function during the sessions.

ART. 26. The following are conditions of eligibility for the national congress:

1. Possession of the rights of Brazilian citizens and of the qualifications for registration as a voter;

2. More than four years of Brazilian citizenship for the chamber and six years for the senate.

This provision does not include the citizens referred to in No. 4 of art. 69.

ART. 27. The congress will establish by special law the cases of electoral incompatibility.

CHAPTER II. THE CHAMBER OF DEPUTIES.

ART. 28. The chamber of deputies is composed of representatives of the people elected by the states and by the federal district by means of direct vote, the representation of the minority being guaranteed.

SEC. 1. The number of deputies shall be fixed by law in a ratio which shall not exceed 1 for every 70,000 inhabitants, the number for each State being not less than 4.

SEC. 2. To this end the federal government shall immediately order the taking of a census of the population of the republic, which shall be revised decennially.

ART. 29. The chamber shall have the initiative in the adjournment of the legislative session and in all laws of taxation, laws fixing the land and sea forces, the consideration of measures proposed by the executive power, and the determination of the admissibility or non-admissibility of charges against the president of the republic, in the terms of art. 53, and against the ministers of state in the crimes related to those of the president of the republic.

CHAPTER III. THE SENATE.

ART. 30. The senate consists of citizens eligible in accordance with the terms of art. 26 and more than 35 years of age, in the number of 3 senators for each state and 3 for the federal district, elected in the same manner as the deputies.

ART. 31. The term of the senators shall be 9 years, the senate being renewed triennially by thirds. The senator elected in place of another shall hold office for the term remaining to the one being substituted.

ART. 32. The vice-president of the republic shall be president of the senate, where he shall have only a deciding vote, and shall be replaced in case of absence or impediments, by the vice-president of the same.

ART. 33. The senate shall have sole power to try the president of the republic and the other federal officials designated by the constitution, in the manner and form prescribed thereby.

SEC. 1. The senate, when sitting as a court justice, shall be presided over by the president of the federal supreme court.

SEC. 2. It shall impose sentence of conviction only by two-thirds of the members present.

SEC. 3. It may impose no penalties other than loss of office and incapacity to exercise any other, without prejudice to the action of the ordinary courts against the condemned.

CHAPTER IV. THE POWERS OF THE CONGRESS.

ART. 34. The national congress shall have exclusive power to:

1. Estimate the receipts and fix the federal expenses annually and examine the accounts of receipts and expenditures of each fiscal period;

2. Authorize the executive power to make loans and engage in other operations of credit;

3. Legislate in regard to the public debt and establish means for its payment;

4. Regulate the collection and distribution of the federal revenues;

5. Regulate international commerce, as well as that of the states with each other and with the federal district, establish custom-houses in the ports, and create and abolish warehouses:

6. Legislate regarding the navigation of rivers that water more than one state, or that extend to foreign territory;

7. Determine the weight, value, design, character, and denomination of the coinage;

8. Create banks of emission, legislate regarding them, and tax them;

9. Fix the standards of weights and measures;

10. Determine finally the boundaries of the states with each other, those of the federal district, and those of the nation with adjoining states;

11. Authorize the government to declare war, if resort to arbitration is not feasible or has failed, and to make peace;

12. Pass finally upon treaties and conventions with foreign nations;

13. Move the capital of the union;

14. Grant subsidies to the states in accordance with art. 5;

15. Legislate on the federal postal and telegraph services;

16. Adopt the regulations requisite for the safety of the frontiers;

17. Fix annually the land and sea forces;

18. Legislate on the organization of the army and navy;

19. Permit or prohibit the passage of foreign troops through the national territory for military operations;

20. Mobilize and utilize the national guard or civil militia, in the cases contemplated by the constitution;

21. Declare in a state of siege one or more points of the national territory, in the emergency of aggression by foreign forces or of internal commotion, and approve or suspend the siege which may have been declared by the executive power or his responsible agents in the recess of the congress;

22. Regulate the conditions and the procedure of the elections for federal offices throughout the country;

23. Legislate regarding the civil, commerical, and criminal law of the republic and the procedural law of the federal courts;

24. Establish uniform laws of naturalization;

25. Create and abolish federal public offices, fix their powers, and determine their salaries;

26. Organize the federal judiciary, in accordance with art. 55, and following, of Sec. III;

27. Grant amnesties;

28. Commute and pardon the penalties imposed upon federal officials for offenses in office;

29. Legislate regarding the lands and mines belonging to the union;

30. Legislate concerning the municipal organization of the federal district, as well as on the police, higher instruction, and the other services which may be reserved in the capital for the government of the union;

31. Subject to special legislation the points in the territory of the republic necessary for the establishment of arsenals and other establishments and institutions of federal utility.

32. Regulate the cases of extradition between the states;

33. Enact the laws and resolutions necessary for the exercise of the powers that belong to the union;

34. Enact the organic laws for the complete execution of the constitution;

35. Extend and adjourn its sessions.

ART. 35. The congress shall also have power, but not exclusively, to:

1. Watch over the constitution and the laws and provide for the necessities of a federal character;
2. Stimulate in the country the development of letters, arts, and sciences, as well as immigration and agriculture, and industry and commerce, without privileges that might hinder the action of the local governments;
3. Create institutions of higher and secondary instruction in the states;
4. Provide secondary instruction in the federal district.

Chapter V. Laws and Resolutions.

Art. 36. With the exceptions contained in art. 29, all bills may originate indiscriminately in the chamber or in the senate, upon initiative of any one of its members.

Art. 37. A bill passed in one of the chambers shall be sent to the other; and the latter, if it concurs, shall send it to the executive power which, if it approves, will sanction and proclaim it.

Sec. 1. If, however, the president of the republic considers it unconstitutional or contrary to the interests of the nation, he will refuse his sanction within ten working days after the one on which he received the bill, returning it within that period to the chamber in which it originated, together with the reasons for his refusal.

Sec. 2. The silence of the president during the ten-day period implies approval; and in case he refuses his approval after the congress has already adjourned, the president will make his reasons public.

Sec. 3. The bill having been returned to the chamber in which it originated will there be submitted to debate and roll-call, where it will be considered repassed if it obtains two-thirds of the votes present. In that case the bill will be sent to the other chamber, which if it approves it in the same manner and by a like majority will send it as a law to the executive power for the formality of proclamation.

Sec. 4. The sanction and the proclamation will take place in the following form:

1. "The national congress decrees and I approve the following law (or resolution)";
2. "The national congress decrees and I proclaim the following law (or resolution)."

Art. 38. If the law is not proclaimed within 48 hours by the president of the republic in the cases enumerated in secs. 2 and 3 of art. 37, the president of the senate, or the vice-president, if the former fails to do so within an equal period, will proclaim it, employing the following formula: "F., president (or vice-president) of the senate, makes known to those to whom these presents may come that the national congress decrees and proclaims the following law (or resolution)."

Art. 39. The bill of one chamber, amended in the other, will be returned to the first, which if it accepts the amendments will send it, altered in conformity therewith, to the executive power.

Sec. 1. In the contrary case, the bill will return to the revising chamber, and if the changes receive two-thirds of the votes of the members present, they shall be considered repassed, being then sent back with the bill to the chamber of origin, which can reject them only by a like majority.

Sec. 2. If the changes are rejected in that manner, the bill will be submitted without them for executive approval.

Art. 40. Bills defeated or not sanctioned, may not be renewed in the same legislative session.

Section II. The Executive Power.

Chapter I. The President and the Vice-President.

Art. 41. The executive power is exercised by the president of the republic of the United States of Brazil, as elective chief of the nation.

SEC. 1. The vice-president, elected simultaneously with him, acts in place of the president in case of his incapacity and succeeds him in case of vacancy.

SEC. 2. In case of incapacity or lack of the vice-president, there shall be called to the presidency successively the vice-president of the senate, the president of the chamber, and the president of the federal supreme court.

SEC. 3. The essential conditions for being elected president or vice-president of the republic are the following:

1. To be Brazilian born;
2. To be in the enjoyment of the political rights;
3. To be more than 35 years old.

ART. 42. In case of vacancy, for whatever cause, of the presidency or vice-presidency, before two years of the presidential term have passed, a new election will be held.

ART. 43. The president shall hold office for four years, and is not reëligible for the term immediately following.

SEC. 1. The vice-president who has exercised the presidency in the last year of the presidential period may not be elected president for the following term.

SEC. 2. The president shall lay down the exercise of his functions, without delay, on the same day on which his presidential term ends, the president-elect immediately succeeding him.

SEC. 3. If the latter is incapacitated, or defaults, the substitution shall take place in accordance with art. 41, secs. 1 and 2.

SEC. 4. The first presidential term shall end November 15, 1894.

ART. 44. On assuming office, the president will make this affirmation before the congress, or, if this is not in session, before the federal supreme court:

"I promise to maintain and fulfil with perfect loyalty the federal constitution, to promote the general welfare of the republic, observe its laws, and support its union, integrity, and independence."

ART. 45. The president and vice-president may not leave the national territory without permission of the congress, under penalty of losing their office.

ART. 46. The president and the vice-president will receive a salary, fixed by the congress in the preceding presidential period.

CHAPTER II. THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT.

ART. 47. The president and the vice-president of the republic shall be chosen by direct vote of the nation and an absolute majority of votes.

SEC. 1. The election shall take place on the first of March in the last year of the presidential period, the canvass of the votes taking place in the federal capital and in the capitals of the states for each respective circumscription. The congress will make the final canvass in its first session of the same year, with whatever number of members present.

SEC. 2. If none of the candidates has received an absolute majority, the congress shall elect by majority vote of those present one of the two candidates receiving the highest vote in the direct election. In case of tie the elder shall be considered chosen.

SEC. 3. The procedure of election and canvassing will be regulated by ordinary law.

SEC. 4. The relatives, by blood or marriage within the first and second degrees, of the president and vice-president in office at the time of the election or within six months before, are ineligible to these offices.

CHAPTER III. THE ATTRIBUTES OF THE EXECUTIVE POWER.

ART. 48. The president of the republic shall have exclusive power to:

1. Approve, proclaim, and make public the laws and resolutions of the congress; issue decrees, instructions, and regulations for their faithful execution;

2. Freely appoint and remove the ministers of state;

3. Exercise or designate the one to exercise the supreme command of the land and naval forces of the United States of Brazil when called to arms in the internal or external defense of the Union;

4. Administer the army and the navy and distribute their respective forces, in accordance with the federal laws and the necessities of the national government;

5. Fill the federal civil and military offices, saving the restrictions expressed in the constitution;

6. Pardon and commute penalties in the crimes subject to federal jurisdiction, save in the cases referred to in art. 34, No. 28, and art. 52, sec. 2;

7. Declare war and make peace in accordance with art. 34, No. 11;

8. Declare immediate war in case of foreign invasion or aggression;

9. Render annual account of the condition of the country to the national congress, recommending the urgent measures and reforms in a message which he will send to the secretary of the senate on the opening day of the legislative session;

10. Convoke the congress in special session;

11. Appoint the federal judges upon nomination of the supreme court;

12. Appoint the members of the federal supreme court and the diplomatic ministers, submitting the nominations to the approval of the senate. In the recess of the congress, appoint them temporarily until the senate acts;

13. Appoint the other members of the diplomatic corps and the consular agents;

14. Maintain relations with foreign states;

15. Declare, personally or through his responsible agents, the state of siege in any part of the national territory, in the cases of foreign aggression, or serious internal commotion (art. 6, No. 3; art. 34, No. 21, and art. 80);

16. Undertake international negotiations, conclude agreements, conventions, and treaties, always subject to the referendum of the congress, and approve those which the states may conclude in conformity with art. 65, submitting them, when expedient, to the authority of the congress.

CHAPTER IV. THE MINISTERS OF STATE.

ART. 49. The president of the republic is assisted by the ministers of state, agents of his confidence, who subscribe to his acts, and each one of whom presides over one of the ministries into which the federal administration may be divided.

ART. 50. The ministers of state may not accumulate the exercise of any other public employment or office, nor may they be elected president, or vice-president of the union, deputy, or senator. The deputy or senator who accepts the post of minister of state shall lose his seat, and a new election shall immediately be held in which he may not be a candidate.

ART. 51. The ministers of state may not appear in the sessions of the congress, and may communicate with it only in writing, or personally in conference with the committees of the chambers. The annual reports of the ministers shall be directed to the president of the republic and distributed among all the members of the congress.

ART. 52. The ministers of state are not responsible either before the congress or before the courts for advice tendered the president of the republic.

SEC. 1. They are responsible, however, as regards their acts, for the crimes defined by law.

SEC. 2. In the ordinary crimes and official crimes they shall be tried and sentenced by the federal supreme court, and in those connected with those of the president of the republic by the authority competent to try him.

CHAPTER V. THE RESPONSIBILITY OF THE PRESIDENT.

ART. 53. The president of the United States of Brazil shall be submitted to trial and judgment, after the chamber has declared that grounds for proceeding exist, before the federal supreme court in ordinary crimes and before the senate in official crimes. When the accusation has been declared well-founded, the president shall be suspended from office.

ART. 54. Official crimes are those acts of the president of the republic which threaten:

1. The political existence of the union;
2. The constitution and the form of the federal government;
3. The free exercise of the political powers;
4. The enjoyment and legal exercise of the political or individual rights;
5. The internal security of the country;
6. The honesty of the administration;
7. The safeguarding and constitutional employment of the public funds;
8. The budget laws voted by the congress.

SEC. 1. These offenses shall be defined by special law.

SEC. 2. Another law shall regulate the accusation, the trial, and the judgment.

SEC. 3. Both of these laws shall be enacted in the first session of the first congress.

SECTION III. THE JUDICIAL POWER.

ART. 55. The judicial power of the Union shall have for its organs a federal supreme court, with its seat in the capital of the republic, and such other federal judges and courts, distributed throughout the country, as the congress may create.

ART. 56. The federal supreme court shall consist of 15 judges, appointed in the manner indicated in art. 48, No. 12, from among citizens of notable learning and reputation, eligible to the senate.

ART. 57. The federal judges hold office for life and can lose their office only by judicial sentence.

SEC. 1. Their salaries shall be fixed by law and may not be reduced.

SEC. 2. The senate will try the members of the federal supreme court for official crimes, and that court will try the inferior federal judges.

ART. 58. The federal courts will elect from their midst their own presidents and will organize their respective secretariats.

SEC. 1. The appointment and removal of the secretarial employees, as well as the filling of judicial offices in the judicial districts, belongs to the respective presidents of the courts.

SEC. 2. The president of the republic will name from among the members of the federal supreme court the attorney-general of the republic, whose attributes will be determined by law.

ART. 59. The federal supreme court shall have power:

1. To try and to sentence, originally and exclusively:

(*a*) The president of the republic for ordinary crimes, and the ministers of state in the cases defined in art. 52;

(*b*) The diplomatic ministers in ordinary and official crimes;

(*c*) The cases and conflicts between the Union and the states, or between these latter one with another;

(*d*) Suits and claims between foreign countries and the Union or the states;

(*e*) Conflicts of the federal judges or courts with each other, or between them and those of the states, as well as those of the judges and courts of one state with the judges and courts of another state;

2. To try, on appeal, questions decided by federal judges and courts, as well as those treated in sec. 1 of the present article, and in art. 60.

3. To review adjudicated cases in accordance with art. 81.

SEC. 1. From the sentences of the state courts of last instance appeal will lie to the federal supreme court:

(*a*) When the validity or application of federal treaties and laws is questioned, and the decision of the state court is contrary thereto;

(*b*) When the validity of the laws or of the acts of state governments is questioned in view of the constitution, and the decision of the state court considers these acts or laws valid.

SEC. 2. In the cases in which the federal judiciary has to apply state laws, they shall consult the jurisprudence of the local courts, and, vice versa, the state judiciary shall consult the jurisprudence of the federal courts when called upon to interpret laws of the union.

ART. 60. The federal judges and courts shall have power to try and to judge:

(*a*) Cases in which either of the parties bases his action or defense on provisions of the federal constitution;

(*b*) All cases instituted against the government of the union or the federal treasury, based on provisions of the constitution, laws and regulations of the executive power, or contracts entered into with said government;

(*c*) Cases arising from compensation, reimbursement, indemnity for damages or any others moved by the government of the union against individuals, or vice versa;

(*d*) Litigation between a state and citizens of another state, or between citizens of diverse states, when the laws of these differ;

(*e*) Suits between foreign states and Brazilian citizens;

(*f*) Actions brought by foreigners and based either on contracts with the government of the union, or on conventions or treaties of the union with other nations;

(*g*) Questions of maritime law and navigation, on the ocean as well as on the rivers and lakes of the country;

(*h*) Questions of international criminal or civil law;

(*i*) Political crimes.

SEC. 1. The congress is forbidden to commit any federal jurisdiction to the state courts.

SEC. 2. The sentences and orders of the federal judiciary are executed by judicial officers of the union, to whom the local police is obliged to render assistance when invoked by them.

ART. 61. The decisions of the state judges or courts, in matters within their jurisdiction, terminate the cases and questions, except as to:

1. *Habeas corpus*, or

2. Estates of deceased foreigners, when the matter is not covered by convention or treaty.

In such cases there shall be voluntary appeal to the federal supreme court.

ART. 62. The state courts may not intervene in questions submitted to the federal courts, nor annul, alter, or suspend their sentences and decrees. And, reciprocally, the federal judiciary may not intervene in questions submitted to the courts of the states, nor annul, alter, or suspend the decisions or decrees of the same, except in the cases expressly declared in the constitution.

TITLE II. THE STATES.

ART. 63. Each state shall be governed by the constitution and laws which it may adopt, the constitutional principles of the union being respected.

ART. 64. The states shall own the mines and unoccupied lands situated within their respective territories, the union possessing only that portion of the territory which may be indispensable for the defense of the frontiers, fortifications, military constructions, and federal railways. The national property not necessary for the services of the union shall pass into the possession of the states in whose territory it may be located.

ART. 65. The states shall have power:

1. To enter into mutual agreements and conventions of a non-political character (art. 48, No. 16);

2. To exercise in general any and every power or right not denied them by express provision of the constitution or contained by implication in such express provisions.

ART. 66. The states are forbidden to:

1. Refuse faith to public documents, of a legislative, administrative, or judicial nature, of the union or of any of the states;

2. Reject the coinage or the bank emissions in circulation by act of the federal government;

3. Make or declare war among themselves or engage in reprisals;

4. Refuse the extradition of criminals, demanded by the courts of other states, or of the federal district, according to the laws of the union by which this matter is governed (art. 34, No. 32).

ART. 67. Saving the restrictions specified in the constitution and the federal laws, the federal district shall be administered by municipal authorities. The expenses of a local character in the capital of the republic fall exclusively upon the municipal authorities.

TITLE III. THE MUNICIPALITY.

ART. 68. The states will organize in a manner that assures the autonomy of the municipalities in everything respecting their peculiar interests.

TITLE IV. BRAZILIAN CITIZENS.

SECTION I. THE CHARACTER OF BRAZILIAN CITIZENS.

ART. 69. The following are Brazilian citizens:

1. Those born in Brazil, though of foreign fathers, if the latter are not resident in the service of their country;

2. The children of Brazilian fathers, and the illegitimate children of Brazilian mothers, born in foreign countries, if they establish a domicile in the republic;

3. The children of a Brazilian father who is abroad in the service of the republic, even though they do not acquire a domicile in Brazil;

4. Foreigners who, being in Brazil on November 15, 1889, do not declare, within six months after the constitution goes into effect, their intent to preserve their original nationality;

5. Foreigners naturalized in other ways.

ART. 70. Voters are the citizens of more than 21 years of age who are registered in conformity with the laws.

SEC. 1. The following may not be registered as voters for either federal or state elections:

1. Beggars;

2. Illiterates;

3. Common soldiers, save the students of the higher military schools;

4. Members of monastic orders, companies, congregations, or communities of whatever denomination, subject to a vow of obedience, rule, or statute which involves the renunciation of individual liberty.

SEC. 2. Citizens not eligible for registration are ineligible for election.

ART. 71. The rights of Brazilian citizens are suspended or lost only in the cases herewith specified.

SEC. 1. They are suspended: (*a*) For physical or moral incapacity; (*b*) For criminal sentence, as long as its effects continue.

SEC. 2. They are lost: (*a*) By naturalization in a foreign country; (*b*) By the acceptance of an office or a pension from a foreign government, without permission of the federal executive power.

SEC. 3. A federal law will determine the conditions for reacquiring the rights of Brazilian citizen.

SECTION II. DECLARATION OF RIGHTS.

ART. 72. The constitution assures to Brazilians and to foreigners resident in the country the inviolability of the rights regarding liberty, personal security, and property, in the following terms:

SEC. 1. No one can be obliged to do or to refrain from doing anything except by virtue of law.

SEC. 2. All are equal before the law.

The republic does not admit privileges of birth, does not recognize courts of nobility, and extinguishes the honorary orders now existing and all their prerogatives and regalia, as well as titles of nobility and of council.

SEC. 3. All individuals and religious confessions may exercise publicly and freely their forms of worship, associating themselves for this purpose and acquiring property, the provisions of the common law being observed.

SEC. 4. The republic recognizes only civil marriage, which shall be free.

SEC. 5. The cemeteries shall be secular in character and shall be administered by the municipal authority, all religious cults being free to practice their respective rites with regard to their own believers, so long as they do not offend public morals and the laws.

SEC. 6. The instruction given in public institutions shall be laic.

SEC. 7. No sect or church shall receive official subsidies, nor maintain relations of dependency or alliance with the government of the union or with those of the states.

SEC. 8. It is permitted to all to associate and assemble freely and without arms, the police not being permitted to intervene except to maintain public order.

SEC. 9. Every person whatsoever is permitted to make representations to the public authorities by means of petition, to denounce abuses, and to promote the responsibility of offenders.

SEC. 10. In time of peace, everyone may enter the national territory or leave it with his fortune and his goods, when and how he pleases, independently of a passport.

SEC. 11. The home is the inviolable asylum of the individual; no one may penetrate therein at night without the consent of the inhabitant, unless to aid victims of crimes or disasters, nor by day except in the cases and in the manner prescribed by law.

SEC. 12. On any subject, the expression of thought by print or on the platform is free, independently of censorship, each one answering for the abuses he may commit, in the cases and in the manner determined by law.

SEC. 13. Except in *flagrante delicto*, no one may be arrested until after formal accusation of the suspect, except in the cases determined by law, and upon written order of the competent authority.

SEC. 14. No one may be kept in confinement without formal arraignment, except in the cases specified by law, nor taken to prison or kept there if he offers requisite bail in the cases in which the law permits it.

SEC. 15. No one may be sentenced save by the competent authority by virtue of an existing law and in the manner stipulated therein.

SEC. 16. The most extensive defense shall be secured by law to the accused, with all the appeals and measures essential thereto, beginning with the written accusation furnished the person arrested within 24 hours and signed by the competent authority, with the names of the accuser and of the witnesses.

SEC. 17. The right of property is maintained to its fullest extent, saving expropriation for public necessity or utility by means of prior indemnity.

The mines belong to the owners of the soil, saving the limitations that may be established by law for the good of the development of this branch of industry.

SEC. 18. The secrecy of correspondence is inviolable.

SEC. 19. No penalty shall extend beyond the person of the offender.

SEC. 20. The penalty of the galleys and of official banishment are abolished.

SEC. 21. Likewise the penalty of death is abolished, saving the dispositions of military law in time of war.

SEC. 22. *Habeas corpus* shall always be granted whenever the individual suffers or finds himself in imminent danger of suffering violence, or coercion illegally or through abuse of power.

SEC. 23. Saving the cases which by their nature belong to special tribunals, there shall be no privileged jurisdiction.

SEC. 24. The free exercise of any moral, intellectual, or industrial profession is guaranteed.

SEC. 25. Industrial inventions belong to their authors, to whom there shall be guaranteed by law a temporary monopoly, or there shall be granted by the congress a reasonable premium when it becomes convenient to make the invention common property.

SEC. 26. The authors of literary and artistic works are guaranteed the exclusive right to reproduce them in print or by any other mechanical process whatever. The heirs of the authors will enjoy this right for the time to be fixed by law.

SEC. 27. The law will also insure property in trade-marks.

SEC. 28. No Brazilian citizen may be deprived of his civil or political rights or exempt himself from the performance of any civic duty by reason of religious belief or office.

SEC. 29. Those who allege religious belief as a motive for exempting themselves from any burden which the laws of the republic impose upon citizens, and those who accept foreign decorations or titles of nobility, shall lose all their political rights.

SEC. 30. No tax of any kind may be levied save by virtue of a law which authorizes it.

SEC. 31. The institution of the jury is maintained.

ART. 73. Public civil and military offices are accessible to all Brazilians, the conditions of special capacity being observed which may be established by law, the accumulation of salaried offices being, however, forbidden.

ART. 74. Permanent patents, posts, and offices are guaranteed to the fullest extent.

ART. 75. Retirement with pay may be allowed public officials only in the cases of incapacity incurred in the service of the nation.

ART. 76. The officers of the army and the navy can only lose their commissions by condemnation to more than two years of imprisonment, imposed by the competent tribunals.

ART. 77. The military forces of land and sea shall have a special court for the trial of military offenses.

SEC. 1. This court shall consist of a supreme military tribunal, the members of which shall hold office for life, and of the councils necessary for the framing of the indictment and the trial of the crimes.

SEC. 2. The organization and functions of the supreme military tribunal will be regulated by law.

ART. 78. The enumeration of the guaranties and rights expressed in the constitution does not exclude other guaranties and rights not enumerated but resulting from the form of government it establishes and the principles it ordains.

TITLE V. GENERAL PROVISIONS.

ART. 79. The citizen invested with the functions of any one of the three federal powers may not exercise those of either of the others.

ART. 80. Any portion of the territory of the union may be declared in a state of siege, the constitutional guaranties being there suspended for a fixed time, when the security of the republic requires it, in case of foreign aggression or internal commotion (art. 34, No. 21).

SEC. 1. If the congress is not in session, and the country is in imminent danger, the federal executive power will exercise this attribute (art. 48, No. 15).

SEC. 2. The latter, however, will, during the state of siege, limit himself in the repressive measures against persons to ordering:

1. Their detention in a place not destined for common criminals;

2. Their banishment to other places in the national territory.

SEC. 3. As soon as the congress convenes, the president of the republic will report to it, with their justification, the exceptional measures that may have been adopted.

SEC. 4. The authorities that may have ordered such measures are responsible for any abuses committed.

ART. 81. Adjudicated cases, in criminal matters, may be reviewed at any time, for the benefit of those convicted, by the federal supreme court, for amending or confirming the sentence.

SEC. 1. The law will determine the cases and the form of review, which can be demanded by the convicted, by any individual, or *ex officio* by the attorney-general of the republic.

SEC. 2. In this revision the penalities of the sentence reviewed may not be increased.

SEC. 3. The provisions of the present article are applicable to the military trials.

ART. 82. Public officers are strictly responsible for the abuses and omissions practised in the exercise of their functions, as well as for indulgence or negligence in not making effective the responsibility of their subordinates. Public officers on assuming office will obligate themselves by formal affirmation to the performance of their legal duties.

ART. 83. The laws of the former *régime* shall remain in force until repealed, so far as they are not expressly or by implication contrary to the system of government established by the constitution and the principles consecrated therein.

ART. 84. The government of the union guarantees the payment of the public internal and external debt.

ART. 85. The officers of the navy and of the auxiliary forces thereof shall enjoy the same commissions and advantages as those of the army in positions of a corresponding class.

ART. 86. Every Brazilian is subject to military service in defense of the country and the constitution, in accordance with the federal laws.

ART. 87. The federal army will consist of contingents which the states and the federal district are obliged to furnish, constituted in conformity with the annual law fixing the armed forces.

SEC. 1. A federal law will determine the general organization of the army in accordance with No. 18 of art. 34.

SEC. 2. The union will undertake the military instruction of the various troops and branches of the service and the higher military education.

SEC. 3. Forced military recruiting is forbidden.

SEC. 4. The army and the navy will be constituted by voluntary enlistment without bonuses, and, lacking this, by drawings previously organized.

For the personnel of the navy, the naval academy, the schools of naval apprentices, and the merchant marine, by drawings, will all contribute.

ART. 88. The United States of Brazil will in no case engage in a war of conquest, directly or indirectly, alone or in alliance with another nation.

ART. 89. A court of accounts is instituted to audit the accounts of receipts and expenditures and to verify their legality, before their presentation to the congress. The members of this court shall be appointed by the president of the republic with the approval of the senate, and may be removed from office only by judicial sentence.

ART. 90. The constitution may be amended on the initiative of the national congress or on that of the assemblies of the states.

SEC. 1. An amendment will be considered proposed when, after being offered by at least one-fourth of the members of either chamber of the national congress, it shall have been approved in three readings, by two-thirds of the votes in one or the other chamber, or when requested by two-thirds of the states within the period of a year, each state being represented by a majority vote of its assembly.

SEC. 2. Such proposal shall be considered approved if in the following year it is accepted after three readings by a two-thirds majority of the votes in the two chambers of congress.

SEC. 3. The amendment when adopted shall be published with the signatures of the presidents and secretaries of the two chambers, and will become an integral part of the constitution.

SEC. 4. Proposals tending to abolish the republican federal form or the equality of representation of the states in the senate may not be made the subject of consideration by the congress.

ART. 91. When this constitution has been adopted it shall be proclaimed by the officers of the congress and signed by the same.

TRANSITORY PROVISIONS.

ART. 1. After this constitution has been proclaimed, the congress, sitting jointly as a general assembly, shall then elect by an absolute majority of votes on the first ballot, and by plurality on the second if no candidate has received an absolute majority, the president and the vice-president of the United States of Brazil.

SEC. 1. This election shall occur by means of two distinct ballotings for president and vice-president, respectively, the ballots for president being first received and canvassed, the same process being then followed for the vice-president.

SEC. 2. The president and the vice-president, elected in the manner specified in this article, will occupy the presidency and the vice-presidency during the first presidential period.

SEC. 3. For this election no incompatibilities will be operative.

SEC. 4. The election being concluded, the congress will consider its constituent function terminated, and, dividing into chamber and senate, will enter upon the exercise of its normal functions on June 15 of the current year, being under no circumstances subject to dissolution.

SEC. 5. In the first year of the first legislature, directly in the preliminary labors, the senate will differentiate the first and second thirds of its membership, whose term of office will expire at the end of the first and second trienniums.

SEC. 6. This division will occur by means of three lists, corresponding to the three thirds, the senators of each state and of the federal district being graded ac-

cording to the order of the votes received by them, so that the one standing first in the order of votes in the federal district and each of the states shall be put into the third belonging to the last triennium, and the two following names into the other thirds in the order of votes received.

SEC. 7. In case of tie, the oldest shall be favored, and when the age is the same the selection being by lot.

ART. 2. Any state which, up to the end of the year 1892, shall not have proclaimed its constitution shall be subjected to that of one of the others, which may seem most convenient for this adaptation, until the state subjected to this rule shall amend it by the process therein determined.

ART. 3. In the measure that the states are organized, the federal government will turn over to them the administration of the services which by the constitution belong to them, and will liquidate the responsibility of the federal administration as regards these services and the payment of the respective personnel.

ART. 4. While the states are occupied with regulating the expenditures during the period of organization of their services, the federal government will for this purpose open up for them special credits, according to the conditions established by law.

ART. 5. In the states that have been organized the classification of revenues established by the constitution will go into effect.

ART. 6. In the first appointments to the federal and the state judiciary, the law judges and the superior judges of greatest note shall be preferred. Those who are not included in the new judicial organization and have served more than 30 years shall be retired with full pay. Those who have served less than 30 years shall continue to receive their salaries until employed or retired with the pay corresponding to the time of their service. The expenses in connection with the retired judges or those put at disposition shall be paid by the federal government.

ART. 7. There is voted for Dom Pedro of Alcantara, ex-emperor of Brazil, a pension which, beginning with November 15, 1889, shall guarantee him for the whole period of his life a decent subsistence. The regular congress in its first meeting shall fix the amount of this pension.

ART. 8. The federal government shall acquire for the nation the house in which Dr. Benjamin Constant Botelho de Magalhães died, and shall order placed therein a memorial tablet in homage to the memory of the great patriot—the Founder of the Republic. The widow of Dr. Benjamin Constant shall enjoy during her lifetime the use of the said house.

We, therefore, order all authorities whom the knowledge and the execution of this constitution may concern, to execute it and to cause it to be executed and obeyed, faithfully and in entire accord with what is contained therein.

Let it be proclaimed and fulfilled throughout the whole territory of the nation.

Done in the hall of sessions of the national constituent congress in the city of Rio de Janeiro, on the twenty-fourth of February, of eighteen hundred and ninety-one, third year of the republic.

(Then follow the signatures of the members of the congress.)

APPENDIX NO. 2.

Constitution of the Empire of Brazil.[1]

TITLE I. THE EMPIRE OF BRAZIL, ITS TERRITORY, GOVERNMENT, DYNASTY AND RELIGION.

ART. 1. The empire of Brazil is the political association of all Brazilian citizens. These constitute a free and independent nation, which admits of no other ties of union or federation inconsistent with its independence.

ART. 2. Its territory is divided into provinces as now existing, which may be subdivided as may be demanded for the good of the state.

ART. 3. Its government is a hereditary, constitutional, and representative monarchy.

ART. 4. The ruling dynasty is that of Dom Pedro I, actual emperor and perpetual defender of Brazil.

ART. 5. The Roman Catholic Apostolic religion will continue to be that of the empire. All other religions are permitted, with their own particular forms of worship, in buildings destined for this purpose, but without any of the external appearance of a church.

TITLE II. BRAZILIAN CITIZENS.

ART. 6. The following are Brazilian citizens:

1. Persons born in Brazil, whether free-born or freedmen, even of foreign fathers, so long as these are not in residence in the service of their country.

2. Children of Brazilian fathers and illegitimate children of Brazilian mothers, born abroad, who establish a domicile in the empire.

3. Children of Brazilian fathers abroad in the service of the empire, even without establishing a domicile in Brazil.

4. All persons born in Portugal and her possessions, who, being residents of Brazil at the time when independence was declared in the province in which they lived, acquiesced in this act expressly or tacitly by the continuation of their residence there.

5. Naturalized foreigners, whatever their religion. The law will determine the qualifications required for obtaining naturalization papers.

ART. 7. The following lose their rights as Brazilian citizens:

1. Those who become naturalized in foreign countries.

2. Those who without permission of the emperor accept employment, pensions, or decorations from any foreign government.

3. Those banished by judicial sentence.

ART. 8. The exercise of political rights is suspended:

1. By physical or moral incapacity.

2. By a sentence involving imprisonment or exile, for the duration of the sentence.

TITLE III. THE NATIONAL POWERS AND REPRESENTATION.

ART. 9. The separation and harmony of political powers is the protective principle of the rights of citizens and the most secure means of making effective the guaranties which the constitution offers.

ART. 10. The political powers recognized by the constitution of the empire of Brazil are four: the legislative power, the moderative power, the executive power, and the judicial power.

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[1] Approved by Emperor Dom Pedro II on March 25, 1824.

ART. 11. The representatives of the Brazilian nation are the emperor and the general assembly.

ART. 12. All these powers are, in the empire of Brazil, delegated by the nation.

TITLE IV. THE LEGISLATIVE POWER.

CHAPTER I.

ART. 13. The legislative power is delegated to the general assembly with the approval of the emperor.

ART. 14. The general assembly consists of two chambers: the chamber of deputies and the chamber of senators or senate.

ART. 15. The general assembly has the power:

1. To administer the oath to the emperor, the prince imperial, the regent, or the regency.
2. To elect the regency or the regent and to determine the limits of his authority.
3. To recognize the prince imperial as successor to the throne, in the first session immediately following his birth.
4. To appoint a tutor for the emperor during his minority in case his father has not named one in his testament.
5. To settle any doubts that may arise concerning the succession to the crown.
6. To make an investigation of the past administration upon the death of the emperor or a vacancy in the throne, and to remedy the abuses that may have crept in.
7. To select a new dynasty in case of the extinction of the ruling one.
8. To make, interpret, suspend, and revoke laws.
9. To watch over the constitution and promote the general welfare of the nation.
10. To determine annually the public expenditures and apportion the direct taxes.
11. To fix annually, upon information from the government, the ordinary and extraordinary land and sea forces.
12. To permit or prohibit the entry of foreign military or naval forces into the empire or its ports.
13. To authorize the government to contract loans.
14. To establish suitable measures for the payment of the public debt.
15. To regulate the administration of national property and order the sale of the same.
16. To create or abolish public offices and fix their remuneration.
17. To fix the weight, value, design, type, and denomination of moneys, as also the standard of weights and measures.

ART. 16. Each of the legislative chambers shall have the designation of "August and Most Worthy Representatives of the Nation."

ART. 17. Each legislature shall have a period of four years; and each annual session shall last four months.

ART. 18. The imperial opening session shall occur each year on May 3.

ART. 19. The closing session shall likewise be imperial, and this, like the opening session, shall be in general assembly, the two chambers sitting jointly.

ART. 20. The procedure and the participation of the emperor shall be governed by the rules of the general assembly.

ART. 21. The election of the respective presidents, vice-presidents, and secretaries of the chambers, the verification of the credentials of the members, the oath of office, and the internal government shall be governed by the respective rules of procedure.

ART. 22. In the joint sessions of the two chambers the president of the senate will preside, the deputies and senators being seated indiscriminately.

ART. 23. No meeting of either chamber may be held unless one more than a half of the membership is present.

ART. 24. The sessions of each chamber shall be public, except in the cases in which the good of the state demands that they be secret.

ART. 25. Measures will be adopted by an absolute majority of the votes of the members present.

ART. 26. The members of each chamber are inviolable for the opinions advanced by them in the performance of their functions.

ART. 27. No senator or deputy may during his term of office be arrested by any authority whatsoever, save upon order of his respective chamber, unless he has been apprehended *in flagrante* in the commission of a capital crime.

ART. 28. If any senator or deputy is arraigned for crime, the judge, suspending all subsequent procedure, shall report to the respective chamber, which will decide whether the proceedings should continue and the defendant be suspended from the exercise of his functions.

ART. 29. The senators and deputies may be appointed to the posts of ministers of state or councilors of state, with this distinction: the senators retain their seats in the senate, but the deputies lose their places in the chamber of deputies, a new election being held in which the deputy in question is eligible for reëlection and may combine the two functions.

ART. 30. They may also combine the two functions if they were already exercising the functions of either of the positions mentioned, at the time of their election.

ART. 31. No one may be at the same time a member of both chambers.

ART. 32. The exercise of any office other than that of councilor or minister of state is suspended as long as the mandate of deputy or senator continues.

ART. 33. In the interval between sessions, the emperor may not employ a senator or deputy outside the empiré, nor may they even exercise the functions of their offices when this makes it impossible for them to appear at the time of the regular or special sessions of the general assembly.

ART. 34. If in any unforeseen case affecting the public security or the good of the state it becomes imperative that a senator or deputy leave for some other commission, the respective chamber can so determine.

CHAPTER II. THE CHAMBER OF DEPUTIES.

ART. 35. The chamber of deputies is elective and temporary.

ART. 36. The chamber of deputies has the sole initiative:

1. As regards taxes.
2. As regards recruiting.
3. In the choice of a new dynasty in case of the extinction of the ruling one.

ART. 37. Likewise in the chamber of deputies there shall commence:

1. The examination of the past administration and the reform of abuses introduced during the same.
2. The discussion of the proposals made by the executive power.

ART. 38. It is within the exclusive power of the same chamber to decree the propriety of the impeachment of the ministers and councilors of state.

ART. 39. The deputies shall receive during the sessions a pecuniary remuneration fixed at the close of the last session of the preceding legislature. Aside from this a reimbursement will be established for the expenses of coming and going to and from the sessions.

CHAPTER III. THE SENATE.

ART. 40. The senate consists of life members and shall be constituted by election in the provinces.

ART. 41. Each province shall send half as many senators as deputies, with this difference, that when the number of deputies from the province is odd, the number of its senators shall be half of the number immediately below, so that a province which sends eleven deputies will send five senators.

ART. 42. A province which sends only a single deputy will still send a senator in spite of the above rule.

ART. 43. The elections will occur in the same manner as for deputies, but in triple lists, from which the emperor will select one-third of the whole list.

ART. 44. Vacancies in the senate will be filled in the same manner as the first election, in each respective province.

ART. 45. The qualifications for senator are:

1. Brazilian citizenship and the enjoyment of the political rights.

2. Forty years of age or more.

3. Knowledge, capacity, and virtues, with preference for those who have rendered service to the country.

4. An annual rental from property, industry, commerce, or employment of 800 milreis.

ART. 46. The princes of the imperial house are senators *ex officio*, and will take a seat in the senate upon attaining the age of 25 years.

ART. 47. The senate shall have exclusive power:

1. To take cognizance of the individual offenses committed by members of the imperial family, by ministers and councilors of state, and by senators, as well as of the offenses committed by deputies during the legislative term.

2. To try ministers and councilors of state for official offenses.

3. To issue the call for the convocation of the general assembly in case the emperor shall not have done so within two months after the time fixed by the constitution, for which purpose the senate will meet in special session.

4. To convoke the assembly upon the death of the emperor for the election of a regency in the cases provided, if the provisional regency fails to do so.

ART. 48. In the trial of crimes in which the accusation is not made by the chamber of deputies, the prosecutor of the crown and of the national sovereignty will bring the charges.

ART. 49. The sessions of the senate will open and close at the same time as those of the chamber of deputies.

ART. 50. Except in the cases specified in the constitution any meeting of the senate at other times than during the sessions of the chamber of deputies shall be null and void.

ART. 51. The remuneration of senators shall be half again as much as that of the deputies.

CHAPTER IV.

THE PROPOSAL, DISCUSSION, APPROVAL, AND PROMULGATION OF THE LAWS.

ART. 52. The proposal, rejection, and approval of bills is within the competence of either chamber.

ART. 53. The executive power exercises his right of initiative in the enactment of laws through any one of the ministers of state; and only after such proposals shall have been considered by a committee of the chamber of deputies, where it must begin, may it take the form of a bill.

ART. 54. The ministers may attend and discuss the proposal after the report of the committee; but they may not vote nor be present at the voting, unless they are senators or deputies.

ART. 55. If the chamber of deputies adopts the proposed measure it will send the same to the senate with the following formula: "The chamber of deputies sends

to the chamber of senators the accompanying proposal of the executive power (with or without amendments) and is of the opinion that it is expedient."

ART. 56. If it can not accept the proposed measure, it will communicate with the emperor through a delegation of seven members in the following tenor: "The chamber of deputies evidences to the emperor its recognition of the zeal shown by him in safeguarding the interests of the empire; and respectfully beseeches him to deign to take under further consideration the proposal of the government."

ART. 57. In general, the measures which the chamber of deputies accepts and approves will be sent to the senate with the following formula: "The chamber of deputies sends the accompanying proposal to the senate and is of the opinion that it is expedient to request therefor the approval of the emperor."

ART. 58. If, however, the senate does not accept the measure of the chamber of deputies in its entirety but has altered or added to it, it will send it back in the following manner: "The senate returns to the chamber of deputies its proposal (so-and-so), with the accompanying amendments or additions, and is of the opinion that with them it is expedient to request of the emperor his approval for the same."

ART. 59. If the senate after deliberation is of the opinion that it can not accept the proposal or bill, it will so say in the following terms: "The senate remits to the chamber of deputies proposal so-and-so, to which it can not give its assent."

ART. 60. The same procedure will be followed by the chamber of deputies with regard to bills originating in the senate.

ART. 61. If the chamber of deputies does not approve the amendments or additions of the senate, or vice versa, and still regards the measure as advantageous, it may by a deputation of three members request the meeting of the two chambers in joint session, to be held in the senate chamber, and in accordance with the conclusions there reached the necessary further steps will then be taken.

ART. 62. When either of the two chambers at the close of its discussions accepts in its entirety the bill sent it by the other, it will couch it in the terms of a decree and after being read in session will send it to the emperor in duplicate originals signed by the president and the two first secretaries of the chamber, requesting his approval in the following formula: "The general assembly sends the enclosed decree to the emperor, judging it advantageous and useful to the empire, and petitions your imperial majesty to deign to give it your approval."

ART. 63. This remittance will be made by a deputation of seven members, sent by the chamber which last considered the bill, which will at the same time inform the other chamber, in which the bill originated, that it has adopted its proposal relating to such matter, and that it has sent the same to the emperor, petitioning him for his approval.

ART. 64. If the emperor refuses his assent, he will reply in the following terms: "The emperor desires to ponder over the bill to decide upon it in due time." To which the chamber will answer that it praises his imperial majesty for the interest which he takes in the nation.

ART. 65. This refusal will have merely a suspensive effect; for whenever two legislatures immediately following the one that passed the measure, reënact it for approval in the same terms, the emperor will be considered to have given his approval.

ART. 66. The emperor will give or withhold his approval for every bill within a month after it has been presented to him.

ART. 67. If he does not do so within the time indicated, it will have the same effect as though he had expressly refused his approval, so that there may begin to be counted the legislatures in which he may still refuse his approval, or the time when the decree may be considered as in force by reason of his having already refused his approval in two preceding legislatures.

ART. 68. If the emperor accepts the bill of the general assembly he will express his approval as follows: "The emperor assents"; with that which is approved and in the terms in which it is to be promulgated as a law of the empire; and one of the two original copies, after being signed by the emperor, will be sent to the archives of the chamber that sent it, and the other will be used for the promulgation of the law by the respective secretary of state, where it will be preserved.

ART. 69. The formula for the promulgation of the law shall be conceived in the following terms: "We, Dom ——, by the Grace of God and the unanimous acclamation of the people, Constitutional Emperor and Perpetual Defender of Brazil, make known to all our subjects that the general assembly decreed and we desire the following law (the entire text of the law in its provisions only): Therefore we command that all authorities charged with the recognition and execution of the law in question shall obey it and cause it to be obeyed and preserved as completely as determined therein. The secretary of state of —— (the competent department) causes it to be printed, published, and enter into effect."

ART. 70. When the law has been signed by the emperor, countersigned by the proper secretary of state, and sealed with the seal of the empire, the original will be retained in the public archives and printed copies sent to all municipal councils of the empire, to all courts and other places where it is necessary that it should be made public.

CHAPTER V. THE GENERAL COUNCILS OF THE PROVINCES AND THEIR ATTRIBUTES.

ART. 71. The constitution recognizes and guarantees the right of every citizen to take part in the affairs of his province, and that are of immediate concern to his peculiar interests.

ART. 72. This right shall be exercised by district councils and by boards, which, under the designation of general councils of the province, shall be established in every province except the one in which the capital of the empire is located.

ART. 73. Each of the general councils shall consist of 21 members in the most populous provinces, such as Pará, Maranhão, Ceará, Pernambuco, Bahia, Minas Geraes, São Paulo, and Rio Grande do Sul; and in the others, of 13 members.

ART. 74. The elections shall be held at the same time and in the same manner as for the representatives of the nation, and for the duration of each legislature.

ART. 75. The age of 25 years, honesty, and a decent living are the qualifications necessary for membership in these councils.

ART. 76. They shall meet in the capital of the province; and in the first preliminary session they shall select a president, vice-president, secretary, and vice-secretary, who will serve for the entire time of the session, and shall examine and verify the legitimacy of the election of their members.

ART. 77. There shall be annual sessions lasting two months, which may be extended for another month if the majority of the council concurs.

ART. 78. More than half of the membership of the council must be present in order to have a session.

ART. 79. The president of the province, his secretary, and the military commander in the province are ineligible for election to the general council.

ART. 80. The president of the province will assist at the installation of the general council, which will occur on the first day of December, and shall have a place equal with that of the president of the council, and at his right hand; and there he will direct his address to the council, informing it of the state of public affairs and of the measures which the province most needs for its improvement.

ART. 81. The councils shall have for principal function the proposal, discussion, and consideration of matters of most interest to their provinces, proposing measures peculiar to and adapted to their localities and needs.

ART. 82. The measures which originate in the district councils will be sent officially to the secretary of the general council, where they will be discussed in open sessions, as well as those that originate in the general councils themselves. Their decisions will be taken by an absolute majority of the votes of the members present.

ART. 83. In these general councils the following matters may neither be introduced nor discussed as bills:

1. Those relating to the general interests of the nation.
2. Those relating to any settlements with other provinces.
3. Those relating to taxes, the initiative with regard to which falls exclusively to the chamber of deputies.
4. Those relating to the execution of the laws; but in this regard they should make representations with their grounds simultaneously to the general assembly and the executive power.

ART. 84. The resolutions of the general councils will be sent directly to the executive power, through the president of the province as intermediary.

ART. 85. If the general assembly is in session at this time the respective secretary of state will send the resolutions to it to be introduced as bills and to receive the approval of the assembly in a single discussion in each chamber.

ART. 86. If the general assembly is not at the time in session, the emperor will order the resolutions temporarily enforced if he considers them deserving of prompt action by reason of the utility that would accrue to the general welfare of the province by their observance.

ART. 87. If, however, these conditions do not exist, the emperor will declare that he suspends his judgment with regard to that matter. To which the council will reply that it received most respectfully the reply of his imperial majesty.

ART. 88. As soon as the general assembly convenes, these suspended resolutions will be sent to it, as well as those that may have been put into effect, to be considered and acted upon in the manner prescribed in art. 85.

ART. 89. The order and manner of business to be followed by the general councils of the province in their activities, as well as their internal and external discipline and order, will all be regulated by rules of procedure enacted for them by the general assembly.

CHAPTER VI. ELECTIONS.

ART. 90. The nomination of deputies and senators for the general assembly and of the members of the general councils of the provinces shall be made by indirect elections, the body of active citizens selecting in parochial assemblies the provincial electors and these the representatives of the nation and the provinces.

ART. 91. In these primary elections the voters shall comprise:

1. Brazilian citizens in the enjoyment of their political rights.
2. Naturalized foreigners.

ART. 92. The following are excluded from voting in parochial assemblies:

1. Those below 25 years of age, among whom are not included married men and military officers above the age of 21, bachelors of law, and clericals admitted to the holy orders.
2. Sons living with their parents, unless they hold public office.
3. Personal servants, not including bookkeepers and first cashiers of commerical houses, servants of the imperial household not with white sleevebands, and the administrators of country estates and factories.
4. Members of religious orders and those that live in monastic communities.
5. Those without a net annual income of 100 milreis from property, industry, commerce, or employment.

ART. 93. Those who may not vote in the primary assemblies of the parish may not form part of nor take part in the choice of any elective national or local authority

ART. 94. All those who are qualified to vote in the parochial primary elections may be electors and vote for deputies, senators, and members of the provincial council except:

1. Those who have not a net annual income of 200 milreis from property, industry, commerce, or employment.
2. Freedmen.
3. Criminals arraigned on complaint or by judicial inquest.

ART. 95. All who are permitted to be electors are eligible for deputies except:

1. Those without 400 milreis of net income in accordance with arts. 92 and 94.
2. Naturalized foreigners.
3. Those not professing the religion of the state.

ART. 96. Brazilian citizens wherever they may happen to be are eligible in any electoral district for deputies or senators, even though they were not born there and are neither resident nor domiciled there.

ART. 97. A law will regulate the process of elections and the number of deputies in relation to the population of the empire.

TITLE V. THE EMPEROR.

CHAPTER I. THE MODERATIVE POWER.

ART. 98. The moderative power is the key of the whole political organization and is intrusted exclusively to the emperor as supreme chief and first representative of the nation, that he may incessantly watch over the maintenance of the independence, equilibrium, and harmony of the rest of the political powers.

ART. 99. The person of the emperor is sacred and inviolable; he is not subjected to any responsibility whatsoever.

ART. 100. His titles are Constitutional Emperor and Perpetual Defender of Brazil, and he is addressed as His Imperial Majesty.

ART. 101. The emperor exercises the moderative power:

1. In appointing the senators in the manner indicated in art. 43.
2. In convoking the general assembly in the intervals between sessions, when the good of the empire demands it.
3. In giving his approval to the decrees and resolutions of the general assembly to give them the force of law.
4. In approving and suspending temporarily the resolutions of the provincial councils.
5. In extending or adjourning the sessions of the general assembly and in dissolving the chamber of deputies in the cases required for the salvation of the state, convoking immediately another to take its place.
6. In appointing and removing freely the ministers of state.
7. In suspending the magistrates in the cases determined in art. 154.
8. In pardoning or reducing the penalties imposed on convicted criminals.
9. In granting amnesties in urgent cases when counseled by the dictates of humanity and the good of the state.

CHAPTER II. THE EXECUTIVE POWER.

ART. 102. The emperor is the chief of the executive power and exercises it through his ministers of state. Its principal attributes are the following:

1. To convoke the new general assembly in regular session on the 3d of May of the third year of the existing legislature.

2. To appoint bishops and incumbents to ecclesiastical benefices.
3. To appoint the magistrates.
4. To fill the other civil and political offices.
5. To appoint the commanders of the military and naval forces and remove them when demanded by the good of the nation.
6. To appoint ambassadors and other diplomatic and commercial agents.
7. To direct political negotiations with foreign nations.
8. To make treaties of offensive and defensive alliance, of aid and commerce, bringing them subsequently to the attention of the general assembly when the interests and security of the state permit it. If treaties concluded in times of peace involve the cession or exchange of territory of the empire or of possessions to which the empire is entitled, they shall not be ratified without the approval of the general assembly.
9. To declare war and make peace, informing the assembly with such communications as are compatible with the interests and security of the state.
10. To issue naturalization papers in conformity with the law.
11. To confer titles, honors, military orders, and decorations in recognition of services performed for the state, pecuniary grants depending upon the approval of the assembly, unless already designated and levied by law.
12. To issue decrees, instructions, and regulations adequate for the proper execution of the laws.
13. To order the application of the revenues designated by the general assembly for the various branches of public administration.
14. To grant or withhold approval to conciliar decrees and papal letters and all other ecclesiastical legislation not contrary to the constitution, the approval of the assembly being requisite if they contain general provisions.
15. To take all necessary measures requisite for the internal and external security of the state, in accordance with the constitution.

ART. 103. The emperor before being acclaimed shall take the following oath on the hands of the president of the senate, before a joint meeting of the two chambers: "I swear to maintain the Roman Catholic Apostolic religion, the integrity and indivisibility of the empire, to observe and compel the observance of the political constitution of the Brazilian nation and of the other laws of the empire, and to promote the general welfare of Brazil as far as in me lies."

ART. 104. The emperor may not leave the empire of Brazil without the consent of the general assembly; and if he does so it will be understood that he has abdicated the crown.

CHAPTER III. THE IMPERIAL FAMILY AND ITS MAINTENANCE.

ART. 105. The heir presumptive of the empire shall have the title of Prince Imperial, and his eldest-born that of Prince of Grand Pará; all the others shall have the title of Prince. The heir presumptive shall be addressed as His Imperial Highness, as likewise the Prince of Grand Pará; the other princes shall be addressed as His Highness.

ART. 106. The heir presumptive upon completing 14 years of age shall take the following oath on the hands of the president of the senate, both chambers sitting in joint session: "I swear to maintain the Roman Catholic Apostolic religion, to observe the political constitution of the Brazilian nation and to obey the laws and the emperor."

ART. 107. The general assembly immediately upon the emperor's succeeding to the empire will assign to him and to his august spouse, the empress, an allowance corresponding to the respect due to his high dignity.

ART. 108. The allowance assigned to the present emperor and his august spouse shall be increased, seeing that the actual circumstances do not permit of fixing at once an amount suited to the respect due their exalted persons and the dignity of the nation.

ART. 109. The general assembly will also assign a maintenance for the prince imperial and the other princes upon their birth. The maintenance allowed to the princes will cease only upon their leaving the empire.

ART. 110. The tutors of the princes will be selected and appointed by the emperor, and the assembly will fix their salaries to be paid by the national treasury.

ART. 111. In the first session of each legislature the chamber of deputies will require from the tutors an account of the state of progress of their august pupils.

ART. 112. When the princesses marry, the assembly will assign them a dowry and upon the payment of the same the maintenance allowance will cease.

ART. 113. The princes who marry and take up their residence outside of the empire will receive for once and all a sum fixed by the assembly, upon which their maintenance allowance will cease.

ART. 114. The allowance, maintenance, and dowry mentioned in the preceding articles will be paid by the public treasury, delivered to a major domo appointed by the emperor, with whom will be adjusted all active and passive transactions affecting the interests of the royal house.

ART. 115. The palaces and national lands belonging actually to Dom Pedro I shall always remain in the possession of his successors; and the nation will look after the acquisitions and constructions it may judge suited to the decent support and recreation of the emperor and his family.

CHAPTER IV. THE IMPERIAL SUCCESSION.

ART. 116. Dom Pedro I, by unanimous acclamation of the people, actual Constitutional Emperor and Perpetual Defender, shall always reign in Brazil.

ART. 117. His legitimate descendants will succeed to the throne in the order of primogeniture and representation, the elder line always being preferred to posterior lines; in the same line the nearer degrees to the more remote; in the same degree the masculine sex to the feminine and in the same sex the elder person to the younger.

ART. 118. If the line of legitimate descendants of Dom Pedro I becomes extinct, then in the life of the ultimate descendant, and during his reign, the general assembly will select a new dynasty.

ART. 119. No foreigner may succeed to the throne of the empire.

ART. 120. The marriage of the princess heir presumptive of the crown shall be made in accordance with the wish of the emperor; if there is no emperor at the time when such marriage is being arranged it can not be consummated without the approval of the general assembly. Her husband shall have no part in the government and shall be called emperor only after having a son or daughter by the empress.

CHAPTER V. THE REGENCY DURING THE MINORITY OR INCAPACITY OF THE EMPEROR.

ART. 121. The emperor is a minor until the completion of 18 years.

ART. 122. During his minority the empire shall be governed by a regency which shall fall upon the nearest relative of the emperor in the line of succession of more than 25 years of age.

ART. 123. If the emperor has no relative that fulfils these requirements, the empire shall be governed by a permanent regency, appointed by the general assembly, consisting of three members, the eldest of which shall be president.

ART. 124. As long as this regency has not been selected, a provisional regency will govern the empire, consisting of the ministers of state and of justice and of the

two councilors of state senior in point of service, presided over by the empress, or lacking her, by the oldest councilor of state.

ART. 125. In case of the death of the reigning empress, this regency will be presided over by her husband.

ART. 126. If the emperor for a physical or moral reason, clearly recognized by a majority of each of the chambers of the assembly, becomes incapable of governing, the prince imperial will reign in his stead, if he is more than 18 years of age.

ART. 127. The regent as well as the regency will take the oath mentioned in art. 103, adding the clause of fidelity to the emperor and of turning over the government to him as soon as he reaches majority or his incapacity ceases.

ART. 128. The acts of the regency and of the regent shall be issued in the name of the emperor by the following formula: "The Regency, or the Imperial Prince Regent, decrees in the name of the Emperor."

ART. 129. Neither the regency nor the regent shall be responsible.

ART. 130. During the minority of the successor to the crown, his tutor shall be the one named by his father in his testament; lacking this, the empress mother shall appoint him as long as she remains unmarried; lacking this, the general assembly will appoint the tutor, but no one shall ever be named tutor who is in line for succession to the throne in case of his failure to succeed.

CHAPTER VI. THE MINISTRY.

ART. 131. There shall be various secretaries of state. The law will designate the matters belonging to each one, and the number of the same; will combine them or divide them as may appear most expedient.

ART. 132. The ministers of state will countersign all acts of the executive power; without which they may not be carried into effect.

ART. 133. The ministers of state shall be responsible for:

1. Treason.
2. Bribery, subornation, or peculation.
3. Abuse of power.
4. Failure to observe the law.
5. For working against the liberty, security, or property of citizens.
6. For any dissipation of public property.

ART. 134. A special law will define the nature of these offenses and the manner of proceeding against them.

ART. 135. The ministers shall not be freed of responsibility by reason of the oral or written order of the emperor.

ART. 136. Foreigners, even though naturalized, may not be ministers of state.

CHAPTER VII. THE COUNCIL OF STATE.

ART. 137. There shall be a council of state composed of life councilors appointed by the emperor.

ART. 138. Their number shall not exceed ten.

ART. 139. The ministers of state shall not be counted in this number, nor are these to be considered councilors without special appointment to this post by the emperor.

ART. 140. The same qualifications are required for councilor of state as for senator.

ART. 141. The councilors of state before assuming office shall swear an oath on the hands of the emperor to maintain the Roman Catholic Apostolic religion; to observe the constitution and the laws; to be faithful to the emperor; to advise him according to their consciences, looking solely to the welfare of the nation.

ART. 142. The councilors shall be heard in all serious matters and general measures of public administration, especially as regards the declaration of war, treaties of peace, negotiations with foreign nations, as well as on all occasions in which the emperor proposes to exercise any of the attributes of the moderative power indicated in art. 101, with the exception of No. 6.

ART. 143. The councilors of state are responsible for all manifestly false counsel offered the emperor contrary to the laws and the interests of the state.

ART. 144. The prince imperial shall by right have a seat in the council of state as soon as he completes 18 years of age; the other princes of the imperial house shall be dependent upon appointment by the emperor for admission to the council of state. They and the prince imperial shall not be counted in the number fixed in art. 138.

CHAPTER XIII. THE MILITARY FORCES.

ART. 145. All Brazilians are obliged to take arms to sustain the independence and integrity of the empire and to protect it against external or internal enemies.

ART. 146. As long as the general assembly does not fix the permanent military and naval forces, they shall continue as then existing until altered for greater or less by the same.

ART. 147. The military forces are essentially obedient; they may never assemble unless so ordered by the proper authority.

ART. 148. It is within the exclusive power of the executive to employ the armed military or naval forces as may seem expedient for the security and defense of the empire.

ART. 149. The officers of the army and navy may not be deprived of their commissions except by a sentence in a proper trial.

ART. 150. A special ordinance will regulate the organization of the Brazilian army, its promotions, pay, and discipline, as likewise for the naval forces.

TITLE VI. THE JUDICIAL POWER.

SINGLE CHAPTER. THE JUDGES AND COURTS OF JUSTICE.

ART. 151. The judicial power is independent and shall consist of judges and jurors, who will take part in civil and criminal cases, in the cases and manner determined by the codes.

ART. 152. The jurors will pass on the facts, and the judges will apply the law.

ART. 153. The law judges shall be permanent, by which it is not understood that they may not be transferred from one place to another for the period and in the manner to be fixed by law.

ART. 154. The emperor may suspend them for complaints lodged against them, having first heard them, secured the necessary information, and the council of state having been heard. The papers relating to them shall be sent to the appellate courts of the respective districts for proceedings in conformity with the law.

ART. 155. These judges can lose their places only by virtue of a sentence.

ART. 156. All law judges and judicial officers are responsible for abuses of power and malfeasance committed in the exercise of their offices; this responsibility will be fixed in a regulatory law.

ART. 157. For subornation, bribery, peculation, and extortion, popular action will lie against them, which may be instituted within a year and a day by the complainant himself or by any individual, following the procedure established by law.

ART. 158. To try cases in the second and last instance there shall be in the provinces of the empire the appellate courts necessary for the convenience of the people.

ART. 159. In criminal cases the examination of witnesses and all other steps of the proceedings after the committment shall be public from the start.

ART. 160. In civil cases and in penalties imposed in civil proceedings, the parties may appoint judges of arbitration. Their decisions shall be executed without appeal, if the parties so agree.

ART. 161. Unless it appears that conciliation has been tried, no proceedings whatever shall be begun.

ART. 162. For this purpose there shall be justices of the peace, who shall be elected for the same time and in the same manner as the members of the district councils are chosen. Their powers and districts shall be fixed by law.

ART. 163. In the capital of the empire, in addition to the appellate court that should exist there as in the other provinces, there shall be a tribunal with the designation of supreme court of justice, composed of learned judges chosen from the appellate courts by seniority and endowed with the title of councilor. In the first organization the judges of the courts to be abolished may be used for this tribunal.

ART. 164. This tribunal shall have jurisdiction:

1. To concede or deny review in the cases and manner determined by law.

2. To judge the offenses and official faults of its members, the members of the appellate courts, the members of the diplomatic service, and the presidents of the provinces.

3. To judge and settle conflicts of jurisdiction and competence of the provincial appellate courts.

TITLE VII. THE ADMINISTRATION AND ECONOMY OF THE PROVINCES.

CHAPTER I. THE ADMINISTRATION.

ART. 165. There shall be in each province a president appointed by the emperor, who may remove him when he believes that the good of the service of the state so requires.

ART. 166. A law will determine his attributes, competence, and authority, and whatever contributes to the better execution of this administration.

CHAPTER II. THE LOCAL COUNCILS.

ART. 167. In all cities and towns now existing, and in those which may hereafter be created, there shall be councils, to whom is assigned the municipal government and administration of such cities and towns.

ART. 168. The councils shall be elective and composed of the number of aldermen determined by law, and he who obtains the largest number of votes shall be the president.

ART. 169. The exercise of their municipal functions, the enactment of their police ordinances, the application of their revenues, and all their special and general powers shall be fixed by a regulatory law.

CHAPTER III. THE NATIONAL FINANCES.

ART. 170. The collection and expenditure of the national finances shall be entrusted to a tribunal under the name of the national treasury, in which in the various steps duly established by law there shall be regulated the administration, collection, and accounting of the same, in mutual relations with the treasuries and authorities of the provinces of the empire.

ART. 171. All direct taxes, save those to be applied to the interest payments and sinking fund of the national debt, shall be fixed annually by the general assembly

continue until their repeal is made public or they are superseded by

2. The minister of state of finances, having received from the other min-
r budgets relating to the expenditures of their respective departments,
ent to the chamber of deputies each year immediately upon the con-
the same a general balance of receipts and expenditures of the national
for the preceding year, and likewise the general budget of all public
res for the coming year, and the amount of all taxes and public revenues.

I. General Provisions and Guaranties of the Civil and Political Rights of Brazilian Citizens.

3. The general assembly at the commencement of its sessions shall inquire
he constitution of the state has been scrupulously observed, in order to
s may be required.

4. If four years or more after the constitution of Brazil has been duly
it is apparent that any of its articles need amendment, the proposal shall
in writing, originating in the chamber of deputies, and supported by a
heir number.

5. The proposal shall be read three times with intervals of six days
each two readings; and after the third reading the chamber of deputies
e whether the proposal is admissible, after which will follow all the steps
for the passage of a law.

6. Having been taken under consideration and the necessity of an
nt having been recognized, a law will be passed to be approved and
ted by the emperor in the usual fashion, and in which it will be signi-
ie electors for deputies in the subsequent legislature that in their man-
y confer special power upon the deputies for the proposed amendment.

7. In the following legislature, in the first session, the matter shall be
d and discussed, and whatever is adopted will prevail for the addition
ration of the fundamental law; and being added to the constitution will
ly promulgated.

8. Only that which relates to the limits and respective attributes of the
wers and to the political and individual rights of the citizens is consti-
everything that is not constitutional may be changed, without the
s referred to, by the ordinary legislatures.

9. The inviolability of the civil and political rights of Brazilian citizens,
st upon liberty, individual security, and property, is guaranteed by the
ion of the empire in the following manner:

citizen may be obliged to do or refrain from doing anything except by
law.

law shall be enacted without a public benefit.

effect shall not be retroactive.

are permitted to communicate their thoughts by words, writings and by
ons in print without dependence upon censorship, the while they must
for the abuses they may commit in the exercise of this right, in the cases
ner to be determined by law.

one may be persecuted by reason of religion, so long as he respects that of
and does not offend public morals.

ryone is free to remain in or depart from the empire, taking with him his
gs, the police regulations being observed and saving damage to a third.

ry citizen possesses in his home an inviolable asylum. At night no one may
erein without his consent or to protect it from fire or flood; and by day
all be permitted only in the cases and manner established by law.

8. No one may be arrested without formal charge, except in the cases determined by law; and in such cases the judge shall by a writing signed by him inform the accused of the reason for his imprisonment, the names of his accusers and of any witnesses there may be, within 24 hours counting from his introduction into the jail, in cities, towns, and other places near the residence of the judge, and in the places remote from such residence within a reasonable time which will be fixed by law, having in view the extent of the territory.

9. Even when formally charged, no one shall be taken to prison or kept there after being arrested if he offers the requisite bail in the cases in which the law permits it; and in general in the crimes which involve no penalties greater than six months of imprisonment or exile from the district, the accused may freely bail himself out.

10. Except in *flagrante delicto* imprisonment can be executed only upon written order of the competent authority. If this imprisonment was an arbitrary one the judge who ordered it and the one who demands it shall be punished as determined by law.

That which relates to arrest before formal accusation does not include military orders, established as necessary for discipline and recruiting in the army, nor cases that are not purely criminal but in which nevertheless the law orders the imprisonment of any person for disobeying the orders of a court or for failing to perform obligation within the time fixed.

11. No one shall be sentenced save by the competent authority by virtue of an existing law and in the manner prescribed therein.

12. The independence of the judicial power shall be maintained. No authority may remove from the courts a pending case, or quash it, or revive finally adjudicated cases.

13. The law shall be equal for all, whether for protection or punishment, and shall reward each according to his merits.

14. Every citizen can be admitted to public civil political or military offices without any other distinction than that based on his capacity or worth.

15. No one shall be excused from contributing to the expenses of the state in proportion to his possessions.

16. All special privileges are abolished which are not necessary and wholly bound up with the office for public purposes.

17. Except in cases which by their nature fall to special judges, in conformity with the law, there shall be no exceptional tribunals nor special commissions for either civil or criminal cases.

18. There shall immediately be enacted a civil and a criminal code, founded on the solid bases of justice and equity.

19. From now on there are abolished scourging, torture, branding, and all other cruel punishments.

20. No penalty shall extend beyond the person of the offender. Therefore, there shall in no case occur the confiscation of goods nor shall the infamy of the criminal be transferred to relatives in any degree whatsoever.

21. The jails shall be safe, clean, and well-aired, there being separate buildings for the separation of offenders, according to their circumstances and the nature of their crimes.

22. The right of property is guaranteed in its entirety. If the public good, legally established, requires the use or employment of the property of a citizen, he shall be previously indemnified for the value thereof. The law will determine the cases in which this single exception may occur, and will fix the rules for estimating the indemnity.

23. The public debt is likewise guaranteed.

24. No kind of labor, cultivation, industry, or commerce may be forbidden, once it is not opposed to public customs, security, or health of the citizens.

25. The professional corporations, their judges, clerks and masters are abolished.

26. Inventors shall have the property in their discoveries or productions. The law will assure them a temporary exclusive privilege, or will reimburse them in reparation of the loss they may incur by reason of making them a general property.

27. The secrecy of letters is inviolable. The administration of the posts is strictly responsible for any violation of this article.

28. The rewards for services rendered the state, whether civil or military, are guaranteed, as also the right to them acquired in conformity with the laws.

29. Public employees are strictly responsible for abuses and omissions practised in the exercise of their functions and for not making the responsibility of their subordinates effective.

30. Any citizen may present in writing to the legislature or to the executive, reclamations, complaints, or petitions, and even expose any infraction of the constitution, demanding before the competent authority the effective responsibility of the infractors.

31. The constitution likewise guarantees public charity.

32. Primary instruction is free to all citizens.

33. Colleges and universities shall be established where the elements of science, literature, and arts shall be taught.

34. The constitutional powers may not suspend the constitution in the parts referring to individual rights, except in the cases and circumstances specified in the following paragraph:

35. In cases of rebellion or invasion by enemies, if the security of the state demands the suspension for a definite time of some of the formalities which guarantee individual liberty, this may be done by special act of the legislative power. If, however, the legislature is not in session at the time and the country is in imminent danger, the government may exercise this same power, as a provisional and indispensable measure, suspending it as soon as the urgent necessity which prompted it ceases, in either case submitting to the assembly, as soon as it meets, a report justifying the imprisonments and other preventive measures taken, and whatever authorities ordered their employment shall be responsible for the abuses practised in this regard.

APPENDIX No. 3.

Some Decisions of the Federal Supreme Court Concerning the Unconstitutionality of Federal Laws.

Dec. 8, 1915—App. Civel No. 2189—Revista do Sup. Trib., Vol. 7, p. 388.
Dec. 30, 1915—App. Civel No. 2000—Revista do Sup. Trib., Vol. 5, p. 541.
Aug. 16, 1919—Rec. Extr. No. 1251—Revista do Sup. Trib., Vol. 21, p. 283.
May 17, 1919—App. Civel No. 3011—Revista do Sup. Trib., Vol. 21, p. 293.
June 23, 1920—Inc. de 1 Art. do Regul. de 1890, considerado lei pr ter sido expedido pelo Gov. Provisorio—Rec. extr. No. 864.
Revista do Sup. Trib., Vol. 24, p. 134.
Apr. 24, 1920—Inc. do art. 22 da Lei de accidentes do trabalho. Conf. de Jurisdicção. No. 467—Revista do Sup. Trib., Vol. 25, p. 263.
Jan. 29, 1920—Emb. Rec. Extr. 1251 (Dec. sobre Justiça Local do Dis. Fed.)—Revista do Sup. Trib., Vol. 27, p. 60.
Apr. 30, 1921—Aggravo de Pet. No. 2841 (Inc. do art. 55 do Decreto 720 to 1890)—Revista do Sup. Trib., Vol. 30, p. 137.
Apr. 22, 1922—Rec. El. No. 359—Revista do Sup. Trib., Vol. 39, p. 252.

APPENDIX No. 4.

Decision of Federal Supreme Court Declaring Provisions of a Law of the Federal Congress Unconstitutional.

Electoral Appeal No. 359—April 22, 1922—Revista do Supremo Tribunal Federal, Vol. 39, p. 252.

> "The recent electoral law is unconstitutional in the part in which it created appeal (*recurso*) to the federal supreme court from the decisions of the electoral boards of appeal, since the ordinary laws can not enlarge or restrict the cases within the jurisdiction of said court, specified in the constitution.
>
> "Application of the federal constitution, articles 59 and 61."

The appellee, resident of the state of Sergipe, requested his inscription in the electoral list, before the law judge of the district of Maroim, submitting therewith the documents required by law. The judge refused the request because he considered that the age of the petitioner had not been duly proven. The latter appealed to the board of electoral appeals, which admitted the appeal and ordered the petitioner inscribed in the voting list. The president of the board, being of contrary opinion, appealed to supreme court in the present case.

The court, acting on the verbal opinion of Justice Pires e Albuquerque, attorney-general of the republic, unanimously rejected the appeal.

The essence of the opinion of the attorney-general was this: The electoral appeal instituted by the recent electoral law should be conducted like the criminal appeals, on which the public prosecutor's department must be heard. Hence, under the terms of the law, as attorney-general of the republic, he should have passed on the appeal now submitted to the judgment of the court.

But before examining the appeal on its merits, which he knew only from the opinion rendered by Justice Sebastião de Lacerda, as reporter, he requested the attention of the court for a preliminary consideration, which it was his duty to raise, and which seemed to him of great relevancy.

The constitution of the republic determined in arts. 59 and 61, the judicial jurisdiction of the federal supreme court. Thus its original jurisdiction, as well as its appellate jurisdiction, is perfectly defined in these provisions, in which respect our Magna Carta departed from its American prototype, in which latter only the original jurisdiction of the supreme court, and not its appellate jurisdiction, was fixed, which latter could be regulated by ordinary law. Our constitution, however, fixed both the original and the appellate jurisdiction, so that the ordinary law can neither enlarge nor restrict this jurisdiction.

Now, examining art. 59, it appears that the federal supreme court has power:

I. To try and to decide, originally and exclusively:
   (a) The president of the republic in ordinary crimes, and the ministers of state in the cases of article 53;
   (b) Diplomatic ministers in ordinary and official offenses;
   (c) Cases and conflicts between the Union and the states, and of the states with one another;
   (d) Suits and claims between foreign nations and the federal Union;
   (e) Conflicts of federal judges among themselves, between them and those of the states, as well as between the judges and tribunals of one state with those of another.

II. To try on appeal questions settled by the federal judges and courts, as well as those of which the present article deals, part 1, and article 60.

III. To review cases finally decided in the terms of article 81, when the validity of the application of the federal law or treaties is in question.

And in art. 61 it established the jurisdiction of the supreme court over the decisions of the judges of the states in *habeas corpus* or in the cases of the estates of deceased foreigners.

Now, examining the case under consideration, it is seen that the same is not included in any of the mentioned hypotheses of the jurisdiction of the federal supreme court. This is an appeal, but it is not an appeal from a federal judge, but from a board of electoral appeals, a composite authority, which has no judicial functions, and the members of which are not federal judges. The law which created the appeal from this board to the supreme court is, therefore, in flagrant disagreement with the express provisions of the federal constitution, not being able in this respect to be regarded as valid.

He requested the strictest attention for this preliminary consideration, permitting himself to remark to the court, that if it, against the express letter of the supreme law, disregarded this consideration, and undertook to permit cases of appeals of the kind under consideration, it could no longer do anything else with them, being unable to perform this labor, leaving to one side the excessive burden already crushing it and which the constitution imposes in arts. 59 and 61. The court would come, if that should happen, to be the revising body in election matters for the entire country. For these reasons he was of the opinion that the appeal should not be allowed.

APPENDIX NO. 5.

Federal Intervention in the State of Rio de Janeiro, 1923.

A. DECREE OF INTERVENTION. DECREE NO. 15922, OF JANUARY 10, 1923.

"The President of the Republic of the United States of Brazil:

"Whereas, the state of Rio de Janeiro actually contains two governments, each of which considers itself legitimately invested with the functions relating to the administration of the state; and

"Whereas, the executive power of the Union, duly informed of this situation, directed on December 23, 1922, a message to the national congress that it might act in the premises; and

"Whereas, notwithstanding the matter was one for the action of the national congress, one of the supposed presidents of the state requested and obtained from the supreme court, by 6 votes to 5, a writ of *habeas corpus* entitling him to assume and exercise the inherent functions of president free from any restraint whatsoever; and

"Whereas, the federal executive power, in obedience to the judicial decision, satisfied the requisition for federal forces necessary to enable the petitioner to assume office, guaranteeing him the exercise of his powers, the *habeas corpus* having thus been executed as evidenced by the official communication of the federal district judge of the state of Rio de Janeiro; and

"Whereas, on the other hand, the other president also assumed office in a like capacity before the assembly which recognized him; and

"Whereas, there has resulted from this situation, both citizens making appointments of police and other authorities, a permanent state of disorder in that unit of the federation, there having been removal of municipal authorities and partisan passions increasing in every instant, and besides endangering society are making themselves felt in the proper sphere of the Union, many of whose collectors, postal, and other authorities are demanding instant measures by the federal government, to guarantee them in the exercise of their functions; and

"Whereas, this state of disorder culminated in the attitude of insubordination of the police forces of the state, which refuse to obey either of the presidents, who

are thereby prevented from employing them for the reëstablishment and maintenance of public order; and

"Whereas, the federal executive power when it directed the messages of December 23 and 30 to the national congress found itself confronted with a perversion of the republican federal form (art. 6, No. 2, of the constitution) and in such cases it is understood that intervention in the states occurs by action of the legislative power; and

"Whereas, however, the national congress could not deal with the situation in the state of Rio; and

"Whereas, it is absurd to suppose that the rule of law which established the principle that in cases of violation or subversion of the republican federal form of government it is the function of the national congress to act in the premises, recognizes no exceptions, since such an interpretation would result in permitting the said form of government to be violated in its constitutional principles if the congress should not be in session; and

"Whereas, therefore, there is nothing to prevent the federal executive power from intervening in any state of the Union to guarantee the republican form of government, until the congress passes finally upon the matter; and

"Whereas, this has already been decided by the federal supreme court in the decision of April 1, 1914: 'It must be noted that if it is primarily the function of the congress to intervene in the case of art. 6, sec. 2, emergencies may nevertheless arise which justify, as in the case of necessity of immediate declaration of war or state of siege, the sole action of the executive, though subjected to the decision of the congress in its first session,' and in the decision of May 23 of the same year, accepting the doctrine of João Barbalho: 'Nevertheless, if the power of intervention is primarily with the legislative power, which is the political power par excellence, the other two powers do not remain without the power of action . . . the executive will have even the initiative of intervention (subject to the determination of the congress) if it becomes imperative to intervene by reason of the danger to public order and it becomes necessary to make immediate use of the armed forces'; and

"Whereas, on the other hand, No. 3 of the same article 6 of the constitution confers upon the federal government the power to intervene in the states of the union in order to reëstablish order and tranquillity in the states, upon request of the respective governments; and

"Whereas, the absence of any government in the state of Rio, for such is the effect of there being no legitimate government there, makes it impossible that the intervention occur 'upon request of the respective governments'; and

"Whereas, however, if this request can not be made because of the lack of any local government, it nevertheless falls as a duty upon the Union to reëstablish the disturbed order in the said state; and

"Whereas, the said constitutional provision, employing the limitation 'upon request of the respective governments' intended to prevent the spontaneous action of the Union with respect to state governments regularly organized; and

"Whereas, however, there is actually no government regularly organized in the state of Rio, and disorder and anarchy are increasing each instant in its territories, attaining the proportion of even threatening the officials of the Union itself; and

"Whereas, the duality of governments is producing this disorder in all the municipalities of the state of Rio, without either of the alleged presidents being able to make their authority effective, and the action of the union is required to attain public peace and tranquillity; and

"Whereas, the doctrines of the supreme court itself have recognized that intervention is a political act within the competence of the legislative and executive powers (decisions of April 1, 1914; May 16, 1914; April 1, 1915);

"Therefore, resolves to intervene under the terms of art. 6, No. 3, combined with No. 2 of the same article of the constitution of the republic, appointing as interventor, on the part of the government of the Union, Dr. Aurelino de Araujo Leal, who will assume the government of the state and will exercise it in the terms of the instructions which will be given him by decree of the executive power."

(Signed) ARTHUR DA SILVA BERNARDES.

Rio de Janeiro, January 10, 1923.

B. INSTRUCTIONS IN EXECUTION OF THE ABOVE DECREE.

"ART. 1. The interventor will assume the government of the state of Rio de Janeiro, appointing his aids in accordance with the laws of the state, for which positions he will select persons unconnected with the contending parties.

"ART. 2. In accordance with the provisions of art. 63 of the federal constitution, the government and administration of the state will be governed by the laws of the same.

"When the said laws do not cover the cases, the federal interventor will take the necessary measures with respect thereto, issuing the necessary regulations and instructions.

"ART. 3. It is understood that the interventor will apply only the laws of the state that were approved or promulgated until 1921, inclusive, on account of the duality of the local assemblies.

"In the fiscal period of 1923 the budget of 1921 will be put into effect, regarding receipts and expenditures, existing contracts being accorded recognition, but not executing the provisions of an extraordinary and temporary nature, this prohibition not applying to extraordinary revenues, which will continue to be collected.

"ART. 4. The interventor will supersede in all respects the normal government of the state, having authority:

"1. To fill vacancies, in conformity with the law;

"2. To remove, if they do not merit confidence, any state officers from their respective functions, and designating others to take their places, being authorized to employ persons not forming part of the local administration, but in both cases temporarily;

"3. To adopt stringent measures for the collection of the state revenues;

"4. To meet the public expenditures in accordance with the state budget;

"5. To exercise supreme supervision, by means of a chief of police appointed by him, over the public safety of the state, freely removing and appointing the police authorities;

"6. To appoint freely, by temporary appointment, a commander for the state police force, and any other assistant officers, from among officers of the army;

"7. To employ the said force in the police service of the state, or to disarm it if that seems necessary;

"8. To employ, in the protection of general safety, the federal military and naval forces placed at his disposition, and to request more effectives from the federal government;

"9. To adopt the necessary measures for the guaranty of all individual rights.

"ART. 5. The interventor will execute all other instructions that may be issued in the same form as these.

"ART. 6. All permanent officers will be guaranteed in their positions.

"ART. 7. As soon as the federal interventor assumes office he shall cause the treasury of the state to be balanced.

"ART. 8. The interventor may not enter into contracts or assume obligations extending beyond the period of intervention.

"ART. 9. The interventor shall enjoy the postal and telegraphic franking privileges.

"ART. 10. Upon the termination of the intervention the federal interventor shall present to the president of the republic, through the minister of justice, a detailed report of the acts of intervention."

(Signed) JOÃO ALVES.

Rio de Janeiro, January 10, 1923.

APPENDIX No. 6.

Acts Relating to the State of Siege, 1922-1923.

A. MESSAGE OF PRESIDENT EPITACIO PESSOA TO THE NATIONAL CONGRESS AND READ IN THE CHAMBER OF DEPUTIES ON JULY 5, 1922. (DIARIO DO CONGRESSO NACIONAL, JULY 6, 1922, P. 1873.)

"*Members of the National Congress:*

"There having broken out a seditious movement in the federal district, with ramifications in the state of Rio de Janeiro, I come to request the national congress to deign to suspend the constitutional guaranties for one month in this capital and in that state.

"The existence of the internal commotion which authorizes the exceptional measure of the siege does not need to be demonstrated; it is there in the sight of all, in the revolt of the military academy, of the fortress of Copacabana and of Fort Vigia.

"A few steps from Rio de Janeiro fighting is in progress; the government forces are struggling with rebels.

"The government has information that these latter have an understanding with individuals in other states.

"I ask, therefore, that the national congress authorize the government to prolong the state of siege and to extend it to other places if the occurrences demand."

(Signed) EPITACIO PESSOA.

Rio de Janeiro, July 5, 1922.

B. ACT OF CONGRESS PASSED ON JULY 5, 1922, BY THE CHAMBER OF DEPUTIES AND APPROVED BY THE SENATE ON THE SAME DAY.

"The National Congress decrees:

"There is declared for a period of thirty days, in the federal district and in the state of Rio de Janeiro, the state of siege, with the suspension of the constitutional guaranties, the president of the republic being authorized to prolong it for a greater period and to extend it to other points in the national territory if the circumstances so require."

Approved and promulgated as legislative decree No. 4548 on the same day. (Diario Official, July 6, 1922, p. 13,199.)

C. ACT OF CONGRESS EXTENDING THE STATE OF SIEGE TO DECEMBER 31, 1922. ENACTED IN THE CHAMBER OF DEPUTIES ON JULY 27, 1922, APPROVED IN THE SENATE ON JULY 28, AND ISSUED AS DECREE NO. 4553 BY THE PRESIDENT ON JULY 29.

"The National Congress decrees:

"There is hereby prolonged, until December 31 of the current year, the state of siege governed by legislative decree No. 4549, of July 5, 1922, with the limitations of arts. 19 and 20 of the federal constitution, the president of the republic being authorized to extend it to other points of the national territory, as well as to restrict it, suspend it temporarily, or terminate it definitely, at any time within the period mentioned, whenever in his judgment the motives which prompted it shall cease to apply."

D. EXECUTIVE DECREE PROLONGING THE STATE OF SIEGE AFTER THE ADJOURNMENT OF THE NATIONAL CONGRESS ON DECEMBER 31, 1922. DECREE NO. 15193, OF JANUARY 1, 1923. (DIARIO OFFICIAL, JANUARY 1, 1923.)

"The president of the Republic of the United States of Brazil, considering that many of the determinative causes of the state of siege declared by the national congress until December 31 still remain in effect, and in view of the necessity of continuing the measures flowing therefrom, in the exercise of the power conferred by art. 48, No. 15, of the constitution of the republic, resolves:

"That the state of siege is declared from now until April 30 of this year in the whole of the federal district and in the state of Rio de Janeiro."

(Signed) ARTHUR DA SILVA BERNARDES.

E. EXECUTIVE DECREE PROLONGING THE STATE OF SIEGE UNTIL DECEMBER 31, 1923. DECREE NO. 16015, OF APRIL 23, 1923.

"The President of the Republic of the United States of Brazil:

"Whereas, the tolerant action of the government has only served to encourage certain subversive elements to continue to threaten public peace, in attempts at disturbing order; and

"Whereas, the government has certain knowledge and indisputable proofs of these facts; and

"Whereas, in order to prevent such attempts from breaking out in fact and actions, it is the duty of the government to anticipate the subversive action, a procedure more humane and less prejudicial than to suppress it, for which latter, moreover, it is completely equipped; and

"Whereas, to make this prevention effective, it is indispensable to employ the state of siege for a period longer than the one for which it has been decreed, inasmuch as the measures to be adopted are various and prolonged, in order to avoid the continuance of the unpatriotic plans for disturbance, with grave and imminent danger to the country; and

"Whereas, the measure of the state of siege has not merely a repressive character, but also chiefly a preventive one, in accordance with the spirit and the letter of the constitution; and

"Whereas, the approaching meeting of the national congress does not preclude the decree of this measure to continue even during the legislative sessions, as has already on various occasions been understood and practised, with unquestioned sanction of art. 34, No. 21, of the federal constitution, which gives the legislative power the authority to suspend the state of siege declared by the executive power, which necessarily implies for the latter the right to declare it for a period that covers that of the legislative sessions; and

"Whereas, the measure being constitutional and necessary, it would be a serious error for the government, cognizant of the subversive plans, to permit these to develop in the period of the initial organization of the chambers, before the latter can arm it with the measures of defense for political and material order; and

"Whereas, on the other hand, the intervention practised in the state of Rio de Janeiro still continues until the national congress acts with respect thereto, and there remains therefore the necessity of the state of siege in that region and in the federal district by reason of the continuity of territory and the natural interrelation of events; and

"Whereas, moreover, there is nothing to prevent the legislative power, either of its own initiative or upon request of the executive, to suspend the state of siege declared hereby, whenever the reasons which prompted it have disappeared; therefore

"Resolves, in exercise of the power conferred by art. 48, No. 15, of the constitution:

"That the state of siege declared for the territory of the federal district and the state of Rio de Janeiro by decree No. 15913, of January 1 of this year, is hereby prolonged until December 31 of the present year."

(Signed) ARTHUR DA SILVA BERNARDES
(and all the cabinet ministers).

Rio de Janeiro, April 23, 1923.

APPENDIX No. 7.

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